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STATE OF SOUTH DAKOTA,

Petitioner,

v.

[redacted], ET AL.,

Respondents.

[redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

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STATEMENT OF THE CASE

A. Historical Background of Sioux Hunting and Fishing.

The Sioux people have always relied on nature's bounty for their sustenance, through hunting, fishing and gathering. *See* R. Meyer, HISTORY OF THE SANTEE SIOUX 6-7 (1980). Although the Teton Sioux are best known as buffalo hunters, "small game, birds, and fish" were also important elements of their diet, and they had a number of diverse fishing methods, including pole fishing, spearing, and seining. R. Hassrick, THE SIOUX, LIFE AND CUSTOMS OF A WARRIOR SOCIETY 168, 172-73 (1964). The use of the alluvial, woodland and riparian resources of the plains, as much as the exploitation of buffalo, made possible their permanent existence as a hunting people on the plains. *Id.* at 164. The District Court found that "[h]unting and fishing . . . by members of the Cheyenne River Sioux Tribe [are] an important cultural, social and religious activity." (JA 67).[1] *See* S. Pond, THE DAKOTA OR SIOUX IN MINNESOTA AS THEY WERE IN 1834 99-101 (1986) (describing the religious "Feast of Raw Fish").

B. Treaties with the Sioux Nation and Early Statutes.

The Missouri River and its tributary rivers historically were important for the Teton Sioux. Lewis and Clark, the first United States officials to visit the area, encountered Teton Sioux along the Missouri between the Cheyenne and the Moreau Rivers, on what is known today as the "taken area" on the Cheyenne River Reservation. B. DeVoto, THE JOURNALS OF LEWIS AND CLARK 47 (1953). The Sioux jealously guarded their territory to protect the hunting, fishing, and gathering which sustained Sioux society and defined Sioux culture. In 1851, when the United States and the Sioux Nation entered into a treaty with several neighboring Indian tribes that set out the boundaries of the tribes' territory and pledged peace, the Sioux reserved "the privilege of hunting, fishing, or passing over" any of the lands described. Treaty of Fort Laramie with the Sioux, 1851, 11 Stat. 549.

In 1866-67, Chief Red Cloud successfully led the Sioux Nation in the Powder River War to protect Sioux hunting grounds from

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[1] Citations to the appendix filed with the petition for writ of certiorari will be styled "A__." Citations to the Joint Appendix will be styled "JA__." References to the Petitioner's Brief will be styled "Pet.Br.__." "P.H.Tr." refers to the transcript of the preliminary hearing.

incursion by the Army and settlers along the Bozeman trail.[2] The United States concluded the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635, "at the culmination of the Powder River War." *United States v. Sioux Nation*, 448 U.S. 371, 374 (1980).[3]

The Great Sioux Reservation was established by the Fort Laramie Treaty of 1868. "The eastern boundary of the Great Sioux Reservation . . . was the low water mark on the east bank of the Missouri River," *Sioux Tribe v. United States*, 316 U.S. 317, 319 (1942), and the reservation included most of western South Dakota. The reservation was to be held for the "absolute and undisturbed use and occupancy" of the Sioux. Fort Laramie Treaty, Art. 1. The Treaty reserved prior Sioux treaty rights, except provisions regarding the payment of annuities. *Id.*, Art. 17.

An Agreement in 1876, enacted into law by the Act of Feb. 28, 1877, 19 Stat. 254 (1877 Act), gained the consent of the Sioux to the construction of roads across the reservation and the "free navigation of the Missouri River," but did not disturb Sioux civil authority, because the Act otherwise preserved prior treaty rights not inconsistent with its provisions. 1877 Act, Art. 8. Indeed, Congress affirmatively pledged to secure the right of self-government to the Sioux. *Id.*

In the 1880s, pressures developed to break up the Great Sioux Reservation to provide land for settlers. The 1889 Agreement, ratified as the Act of March 2, 1889, 25 Stat. 888, took nine million acres of the Great Sioux Reservation as "surplus land," and established the Pine Ridge, Rosebud, Standing Rock, Cheyenne River, Lower Brule and Crow Creek Sioux Reservations on

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[2] While this war raged, a Joint Special Committee of Congress inquired into the condition of the Indian tribes. The Committee found tribes "in a bad way . . . because of the loss of land and the *growing scarcity of game*. . . ." R. Utley, THE INDIAN FRONTIER OF THE AMERICAN WEST 1846-1890 106 (1984)(emphasis added).

[3] As this Court noted in *Sioux Nation*:

> The Fort Laramie Treaty was considered by some commentators to have been a complete victory for Red Cloud and the Sioux. In 1904 it was described as "the only instance in the history of the United States where the government has gone to war and afterwards negotiated a peace conceding everything demanded by the enemy and exacting nothing in return."

448 U.S. at 376 n. 4. *See* F. Prucha, THE GREAT FATHER 493 (1986).

remaining tribal lands. The Cheyenne River Reservation is bounded by "the center of the main channel of the Missouri River" on the east. The 1889 Agreement expressly preserved any rights under the Fort Laramie Treaty of 1868 that were "not in conflict" with the Act. 1889 Act, § 19.

The 1889 Act also provided for allotment of tribal land to individual Indians under twenty-five year trust patents to promote farming. *Id.*, §§ 8-11, 17. Most tribal land, however, was not suitable for farming: "Year after year the would-be farmers watched the corn and other crops burn up and blow away, or vanish under great clouds of grasshoppers, or disintegrate under pulverizing hail." Utley, *supra*, at 240. On their reservations, the Sioux continued the traditions of hunting, fishing, and gathering. Red Cloud told the Indian agent at Pine Ridge, "the Great Spirit did not make us to work [the fields]. He made us to hunt and fish." *Id.* at 239-40.

In 1908, "Congress authorized the Secretary of the Interior to open 1.6 million acres of the Cheyenne River Sioux Reservation for homesteading." *Solem v. Bartlett*, 465 U.S. 463, 464 (1984); Act of May 29, 1908, ch. 218, 35 Stat. 460 *et seq.* ("1908 Act"). Congress did not, however, alter the reservation boundaries established by the 1889 Agreement. *Solem*, 465 U.S. at 474-81.[4] Congress kept nearly all of the land along the Cheyenne and the Missouri Rivers closed to non-Indian settlement.[5] Thus, the District Court found that two-thirds of the Tribe's trust lands "border the Missouri and Cheyenne Rivers on the eastern and southern boundaries of the reservation." (JA 65). The 1908 Act provides that the benefits of any existing treaties "not inconsistent with the provisions" thereof were not disturbed. 1908 Act, § 9.

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[4] "[T]he opening of the Cheyenne River Sioux Reservation was a failure." *Solem*, 465 U.S. at 480. "Few homesteaders perfected claims on the lands . . . due to the fact that the opened area was much less fertile than the lands in southern South Dakota opened by other surplus land acts." *Id.* Lands not sold to settlers were later returned in trust to the Tribe. *See* 25 U.S.C. § 463.

[5] Subsequently, Congress enacted legislation aimed at consolidating tribal ownership of land along the Missouri and Cheyenne Rivers. Pub.L. No. 418, 78 Stat. 389 (1964).

C. The Indian Reorganization Act of 1934 and Tribal Management of Reservation Wildlife Resources.

The Indian Reorganization Act (IRA), 48 Stat. 984 *et seq.*, 25 U.S.C. § 461 *et seq.*, was "specifically intended to encourage Indian tribes to revitalize their self-government." *Fisher v. District Court*, 424 U.S. 382, 387 (1976). The Cheyenne River Sioux Tribe did so by adopting a tribal Constitution and By-Laws under the aegis of the IRA in 1935. 25 U.S.C. § 476 (JA 269). The Constitution and By-Laws, drafted with the assistance of the Bureau of Indian Affairs and approved by the Secretary of the Interior, vested the Tribe's pre-existing authority to license hunting and fishing on the reservation. Article VII, § 2 of the By-Laws authorizes the Tribal Council to pass ordinances for the control of hunting and fishing upon the reservation, not conflicting with any federal or state game laws; to cooperate with federal and state conservation efforts; and to issue licenses for hunting and fishing. (JA 281). In the early days of reservation life, deer and antelope herds were numerous, but by 1910, big game "had practically disappeared from the area." Trial Exh. 94 at 2. Therefore, wildlife conservation was a primary concern of the reorganized Tribal Council. The District Court found that, with the passage of the IRA, "the Tribe enacted ordinances, promulgated under the authority of Article VII of the Tribal By-Laws and approved by the Bureau of Indian Affairs (BIA), which required nonmembers to obtain a tribal permit to hunt or fish on the reservation." (JA 65-66). *See* Tribal Ordinances Nos. 2, 3, 4; (JA 152).

Tribal Ordinance No. 2, enacted in 1937, made it "unlawful for any non-member of the Cheyenne River Sioux Tribe . . . to fish or hunt within the Reservation . . . without first having procured a Reservation permit to do so." Ordinance No. 2 also provided substantive fishing regulations, a strict licensing system for beaver trapping, and closed seasons on big game hunting, including deer and antelope.

In 1943, the BIA report on the Cheyenne River Sioux Reservation stated that "[w]ildlife, although not of primary importance in the economy of the Indians on the Cheyenne River Reservation, does furnish a considerable quantity of food and cash income for many families. . . .*Both Indians and Whites do considerable fishing for sport*. . . . Big game is not very plentiful on the reservation area

and no open season is allowed for either whites or Indians to hunt." Trial Exh. 58 at 12 (emphasis added). The BIA report concluded that average Indian family income in 1943 was only $728.46, and that more than half of Indian families had annual incomes below $500. *Id.* at 13.

In 1946, the U.S. Fish and Wildlife Service issued a report describing the progress made in reservation wildlife management in the Lake States and the Dakotas since passage of the IRA, noting that "the tribes which accepted [the IRA] . . . have been able to formulate constitutions and by-laws which give them the power to set up restrictive regulations for managing their wildlife." (JA 161).[6] In regard to waterfowl, upland game birds, and small game, the U.S. Fish and Wildlife Service explained that, although these species are not hunted heavily by Indians, there was a need for tribal regulation because the "abundance [of small game] has attracted non-Indian hunters and the increased hunting pressure brought on by them is forcing the Indians to realize that they must manage these species." (JA 171).

In regard to fishing, the U.S. Fish and Wildlife report recognized that Indians "derive considerable income from the sale of special licenses and by serving as guides." (JA 168-69). With respect to furbearers, the Cheyenne River Sioux Tribe's system of regulating the beaver take was commended for providing harvesting on a "sustained yield" and was recognized as the best of the systems studied. *Id.* From 1943 to 1947, reservation wildlife populations increased substantially, and the quantity of game taken on the reservation increased as well. Trial Exh. 93 at 16.[7] Due to the

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[6] *See also* JA 166-67 ("White-tailed deer on the Cheyenne River Reservation . . . have been protected since 1937. . . . Within a few years it will be possible to have an open season there under a permit system. . . . Antelope on the Cheyenne River Reservation have been protected since 1937 and this herd has been on the increase since that time. . . . Seventy-five percent of this reservation is suitable for antelope, and the range will support between 1,500 and 2,000 animals. . . . When that population is reached, it will be possible to have a limited annual harvest.").

[7] In a single year, the Cheyenne River Reservation wildlife harvest was: "46 deer, 31 morning dove, 557 fox squirrel, 4,660 cottontail rabbit, 88 beaver, 2 muskrat, 4 mink, 629 striped skunk, 13 spotted skunk, 73 badger, 11 weasel, 79 raccoon, 263 coyote, 1,895 jack rabbit, 2,488 pheasant, 168 sharp-tailed grouse, 1,401 prairie chicken, 136 Hungarian partridge, 625 ducks and 52 geese, . . . 2,616 channel catfish, 19 buffalo fish, and 51 of other species." Trial Exh. 93 at 16.

Tribe's conservation measures, in 1947 both deer and antelope seasons were opened to members and non-members, and 80 deer and 20 antelope were taken. Trial Exh. 93 at 15.

D. The Flood Control Act of 1944 and the Act of September 30, 1950.

Prompted by severe floods that devastated the lower Missouri River Basin in 1943 and 1944, Congress passed the Flood Control Act of 1944, 58 Stat. 887, which provided for six main stem reservoirs on the Missouri River. The Act did not address tribal rights or power in any way, except to require that "irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands." 58 Stat. 891 (*quoted in* A29 n.15).

Representative Case of South Dakota introduced legislation in 1949 to authorize the Chief of the Army Corps of Engineers and the Secretary of the Interior to negotiate contracts with the Cheyenne River and the Standing Rock Sioux Tribes for the acquisition of lands needed for the Oahe Dam and Reservoir and for the protection of Indian interests. Pub.L. No. 870, 64 Stat. 1093 (1950)(the 1950 Act)(A187). Congress recognized that the Cheyenne River Sioux Tribe was being asked to make enormous sacrifices for downstream flood control that would benefit the general public greatly, but that would devastate the Tribe by flooding the best tribal land.[8] The Department of the Army reported that the best reservation land was the river bottom lands, and that "[p]ractically all of this river bottom land will be inundated, amounting to about 95,500 acres on the Cheyenne River Reservation." *Hearing on H.R. 5372 Before the Subcomm. of the Senate Comm. on Interior and Insular Affairs*, 81st Cong., 2d Sess. 19 (1950)("1950 Senate Hearing"). Senator Gurney of South Dakota, who with Senator Mundt had introduced a companion bill in the Senate, S. 1488, personally attested that the tribal lands sought by the United States were the "richest lands" on

[8] Because of the Tribe's northern location along the Missouri River, flood damage to the Tribe was historically minimal. "The building of the Oahe Dam and Reservoir is deemed necessary to protect areas in Kansas, Missouri, Nebraska, and Iowa, all of which lie below the Dam site. No benefits will accrue to the Indians of the Cheyenne River and Standing Rock Reservations." H.R. Rep. No. 1047, 81st Cong., 1st Sess. 3 (1950).

the reservation, and wanted "the Indians to be taken care of completely because they have treaty rights." *Id.* at 5-6. The bill contemplated that Congress would fulfill its duty as trustee for the tribe by acting as "the representative of the Indians to see that they get a fair settlement." *Id.* at 36 (remarks of Sen. Gurney).

Congress expected that part of the detriment to the Sioux tribes would be offset by the development of the Oahe Reservoir. Flood control was "going to take away the chance for farming," but Senator Gurney explained that the project was not going to be "entirely bad for the Indians" because "there would be hundreds of miles more of lake shore than there presently [are] of river shore." *Id.* The Indians would "have a lake instead of a river," "better fishing," and "a chance to grow new trees and woodlands on a much longer shore." *Id.* at 7. The Sioux tribes stood to "gain in great measure a lot of the things we are trying to build up out there, recreational areas, fishing and what-not, wildlife of all kinds." *Id.* Senator McFarland, Chairman of the Committee, recognized that the most valuable natural Indian agricultural lands were to be taken without any substitution of irrigated lands, but took comfort from the idea that the tribes should be able to "build up a recreational area there that might be valuable." *Id.* at 8. Senator Gurney agreed, "That is right."

Congress was determined to "provide for the preservation of any treaty rights of the tribe in regard to fishing and hunting and trapping insofar as possible." *Id.* at 13 (remarks of Sen. Mundt). Representative Case noted that "[h]unting and fishing rights also were a part of the rights recognized by treaty in 1851 and 1868 and ratified by Congress. To the extent that these may be impaired or destroyed the tribe is entitled to compensation apart from settlement with the allottees holding individual tracts of land." (JA 187).

The Secretary of the Interior reported that the Cheyenne River Sioux Tribe's natural resources would be severely impaired by the destruction of specific wildlife and the inundation of then-existing recreational areas.[9] The Department of the Army made similar

[9] "On the Cheyenne River Reservation, over 400 deer are estimated to live year long in the timbered area which will be inundated. In the bottoms area, pheasants, rabbits and raccoons are numerous. Several hundred bank-denning beaver are annually taken from the same area. Wildlife which provides important food for over 100 families will be lost." 1950 Senate Hearing at 23.

findings. Yet neither the Army nor the Department of the Interior ever suggested that the Tribe's pre-existing authority to license reservation hunting and fishing would be extinguished by the acquisition of lands for flood control.[10] Finally, the 1950 Act authorized the payment of the Tribe's relocation costs in addition to the fair market value of the land and improvements in the project area. The Department of the Army did not object to payment of relocation costs "because of the special trustee relationship between the Government and the Indians." 1950 Senate Hearing at 17.

The 1950 Act acknowledged the duty of the United States to identify "the rights of the Indians, both tangible and intangible," that would be taken for the construction of the Oahe Dam. 1950 Senate Hearing at 4. Against this background, the District Court concluded that the 1950 Act "*sought to preserve treaty hunting and fishing rights*." (JA 137)(emphasis added).

E. The Cheyenne River Act of 1954.

The Oahe flood control project required 340,000 acres of land, and the Cheyenne River Sioux Tribe was asked to contribute 104,000 acres of the total, or slightly less than 30%. In 1952, the Army Corps of Engineers, the BIA and the Tribe met to negotiate the acquisition of Indian lands. The negotiators were unable to resolve their differences on compensation, so Senator Case and Representative Berry of South Dakota introduced legislation to conclude the transaction. The Joint Senate and House Subcommittee on Indian Affairs held hearings on these bills in 1954.[11] During

[10] The Department of the Interior recommended the inclusion of statutory language providing for the "preservation of any treaty rights of the tribe in regard to fishing, hunting, and trapping, insofar as may be practicable under the physical conditions existing when the Oahe project is completed." S. Rep. No. 1737, 81st Cong., 2d Sess. 1-2 (1950). Although the House Bill included this language, the Conference Committee deleted individual references to particular topics, such as a proposed reservation of electric power or the language regarding hunting and fishing, as inappropriate at that preliminary stage of the legislation. 96 Cong. Rec. at 15609 (Rep. Case). The Conference Committee also added a requirement that the agreement be approved by three-fourths of adult members of the Tribe, in accord with the tribal land acquisition provisions of the Fort Laramie Treaty of 1868, Art. 12. *See* Pub.L. No. 870, § 5(b) (A193).

[11] *Hearings on S. 695 and H.R. 2233 Before the Comm. on Interior and Insular Affairs, Joint Senate and House Subcomm. on Indian Affairs*, 83rd Cong., 2d Sess. 9-10 (1954). ("Joint Senate-House Hearings").

the negotiations a "serious area of disagreement concerned compensation for tangible future damages." H.R.Rep. No. 2484, 83rd Cong., 2d Sess. 4 (1954). The Tribe requested damages for the loss of grazing permit revenue because, with the loss of the hay and shelter provided by river bottom lands, the remaining tribal lands would lose value as grazing lands.[12] Tribal negotiators analogized this loss to the lost property tax revenue stream for which state and local governments had been compensated by the Tennessee Valley Authority. (JA 204). The Army, the Department of the Interior, and the Tribe also recognized that the Tribe should be compensated for the wildlife and wild fruit resources that would be destroyed by the flooding.[13]

The government negotiators did not at any time represent that tribal authority to regulate hunting and fishing would be ceded, and compensation was neither requested nor offered for the loss of hunting and fishing license revenue. The District Court found that, although "the Cheyenne River Act compensated the Tribe for grazing permit revenue loss," the Act did not provide any compensation for loss of a revenue stream from hunting and fishing licenses. (JA 124).

The purposes of the Cheyenne River Act were "[t]o provide for the acquisition of lands by the United States required for . . . the construction of the Oahe Dam," and "for rehabilitation of the Indians of the Cheyenne River Sioux." Pub.L. No. 776, Section I, 68 Stat. 1191 (1954)(JA 234). In Section II, the Tribe conveyed to the United States the tribal and allotted lands required for the Oahe Reservoir, including "the bed of the Missouri River so far as it is the eastern boundary" of the reservation, subject to the conditions of the agreement set forth thereafter. The District Court held that the "fact that the Tribe voted to convey limited title to lands necessary for the federal project does not positively denote a

[12] Initially, the Tribe requested $4,014,467 for grazing revenue loss, but later revised the request to $2,226,701. H.R.Rep. No. 2484 at 5.

[13] Initially, the Tribe requested $1,857,500 to compensate for the destruction of wildlife, wild fruit, and other natural resources, which would be caused by the flooding. H.R.Rep. No. 2484 at 5. The Department of the Army objected that the Tribe's request did not take into account the value of wildlife resources which were to be reserved by the bill, and later, the Tribe reduced its request for compensation to $1,056,750. *Id.*

relinquishment of tribal jurisdiction over those lands." (JA 102). Both courts below agreed that the Cheyenne River Act did not alter the boundaries of the reservation (A21; JA 102). Petitioner did not appeal this ruling.

Under the express terms of the Act, the Tribe retained important interests in the flood control lands, including "all mineral rights of whatsoever nature at or below the surface within the taken area," Section VI (JA 240), the right to "remove all timber" within the taken area, Section VII (JA 241), and the right to use the taken lands until the Oahe Dam gates were closed. Section IX (JA 242). Most significantly, Section X (JA 243-44) provides:

> [T]he said Indian Tribe and the members thereof shall have the right to graze stock on the land between the level of the reservoir and the taking line. . . . The said Tribal Council and the members of said Indian Tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

Representative Berry suggested that the Tribe should have the right to lease the taken area. The general counsel for the Tribe, Mr. Case, explained that Section X reserved the Tribe's "right to graze cattle on that strip between the water level and the taking line." (JA 211). In addition, Mr. Case explained that the Tribe retained its hunting and fishing rights through Section X, including the right to license those activities by non-Indians: "No white citizen of South Dakota can go on this reservation and hunt unless he has first obtained a license from the Tribal Council. Our right to continue hunting and fishing is to us an extremely valid and valuable right." (JA 214)(emphasis added). The Department of the Army similarly recognized that the Cheyenne River Oahe Act "contemplates reservation of fishing and hunting rights by the Indians." S.Rep. No. 2489, 83rd Cong., 2d Sess 12 (1954).

F. Post-Legislation History.

The United States acquired approximately 104,000 acres of land from the Cheyenne River Sioux Tribe for the construction of the Oahe Dam. Roughly 2,000 acres consisted of land underlying the

Missouri River. Joint Senate-House Hearing at 62-63. The United States also acquired 18,000 acres of land within the reservation from non-Indians through condemnation. Together, these lands constitute the "taken area" of the Army Corps of Engineers. Of course, much of this area is inundated by the waters of the Oahe Reservoir.[14]

Since the closing of the Oahe Dam, the Tribe has leased *all* of the taking area lands for grazing, including former non-Indian lands. (JA 67); Trial Exh. 277 (United States Comptroller General Opinion). The Tribe exercises grazing rights according to its tribal grazing code, which is approved by the BIA and enforced with assistance from the BIA. Administering both federal and tribal regulations, the BIA treats taken area lands in the same manner as it treats Indian lands on the reservation. Trial Tr. at 887-88, 896-97, 906-07 (Lilly). The Tribe grazes its buffalo herd along the taken area, P.H. Tr. at 180 (LeBeau) and "[m]uch of the taking area is fenced as parts of range units maintained by Indian ranchers who have grazing rights on the taking area." (JA 12). The District Court found that *"[t]he taking land has a distinct Indian flavor since it is owned by the federal government and largely controlled by Indians through grazing agreements."* (JA 17)(emphasis added).

The Tribe and the Indian ranchers on the taken area have experienced problems with non-Indian hunters shooting near livestock, leaving gates open, cutting fences, trapping on the taken area and otherwise interfering with the exercise of tribal grazing rights in the taken area. (JA 71). The Tribe's buffalo herd manager, Sebastian LeBeau, testified that he had repeatedly had problems with non-Indian hunters interfering with and endangering the buffalo herd on the taken area and adjacent tribal lands.[15]

The taken area is not clearly delineated from adjacent Indian lands by fences or markings (JA 12), and the District Court found

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[14] Appended to this brief is a map of the Cheyenne River Sioux Reservation that reproduces in color the information conveyed in black and white by Tr.Exh. 95.

[15] "On weekends we'd get a large amount of non-Indian bird hunters . . . walking up and down the creeks shooting birds. . . . It disturbs our herd. There's also . . . a grave danger of one of the hunters possibly getting attacked by one of our herd bulls . . . . There have been instances where I've witnessed boat hunters shooting at birds flying in front of where the herd was standing." P.H.Tr. at 180-82. An Indian rancher, who grazes stock on the taken area, testified that one of his goats had been shot by a non-Indian hunter. *Id.* at 195.

that, "[i]n many cases, hunters pass through Indian land to access the taking area." (JA 12).[16] Consequently, the Tribe and its member ranchers experience difficulties with non-Indian hunters trespassing on Indian trust lands. P.H.Tr. at 180-82. The District Court acknowledged that non-Indian hunters "harassed cattle grazing on the taken area or on tribal lands, failed to close pasture gates, or let down wires on fences," but discounted the these problems because they supposedly had not resulted in "extraordinary enforcement efforts" by tribal game wardens. (JA 71).

The District Court found that the Tribe continuously enforced its hunting and fishing regulations against *all* hunters and fishermen on the taken area. (JA 66).[17] Tribal game management efforts were successful enough to receive national attention in hunting periodicals.[18] The Tribe has also invested substantial efforts in its fishing management program,[19] although the program has been hampered by a lack of funds. (JA 73).

Congress allows Indian tribes to contract with the Department of the Interior to perform federal services for their reservations, *see* 25 U.S.C. § 450 *et seq.*, and the Tribe provides fish and wildlife management services under such a contract. Trial Exh. 15. Prior

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[16] The District Court noted that even though its opinion on the preliminary injunction concentrated on hunting, "[e]verything said in this opinion regarding hunting and hunters is meant to include fishing and fishermen." (JA 12 n. 1).

[17] The Tribe generally found it unnecessary to enforce tribal wildlife laws in tribal court because non-Indian hunters and fishermen voluntarily complied by purchasing the requisite tribal hunting and fishing licenses. (JA 16-20). In the single tribal court action on record, a non-Indian hunter who had been confronted by federal enforcement officers admitted the jurisdiction of the tribal court and paid a $150 fine for hunting without a tribal license. *C.R.S.T. v. Key* (Chey.R.Sx.Sup. Ct. 1990), appended to Defendant's Post-Trial Br. as Exh. B.

[18] *See, e.g., Petersen's Hunting* (April, 1984) Trial Exh. 91 ("It took my Sioux guide exactly four minutes to find the first herd of pronghorns. . . [P]ronghorns, whitetail and mule deer, waterfowl, and upland game birds . . . were plentiful because of good management . . . on the Cheyenne River and Standing Rock reservations. . . [P]rogressive tribal administrations are waking up to the fact that, properly managed, the deer, antelope, elk, bison, and other species they've always taken for granted can be a financial bonanza.").

[19] The Tribe sold 200 fishing licenses in 1984 and the tribal game, fish and parks department had a boat to enforce tribal regulations on the rivers. Trial Exh. 91. The Tribe also stocked the artificial lakes on the reservation. One rancher, for example, received 1,000 six-inch rainbow trout in 1984. Trial Exh. 91.

to this lawsuit, the Tribe asked Congress to increase funding under this contract. Congress added $100,000 specifically to the tribal game, fish and parks budget, bringing the fiscal year 1989 budget to $170,290. P.H.Tr. at 232-35.[20] Consequently, since the trial of this action, the Tribe has acquired more boats, and hired a fishery biologist and a wildlife biologist. Eagle Butte News, Nov. 12, 1992, at 7. The Tribe has also assisted the State in fish-stocking efforts, *see* Agreement Between Cheyenne River Sioux Tribe and South Dakota — Egg Taking, April 13, 1992, and has independently stocked 20,000 walleye fingerlings in Lake Oahe. Eagle Butte News, Oct. 22, 1992, at 5. Indeed, the District Court found that "notwithstanding this litigation, the state conservation officers and tribal game wardens appear to enjoy an amicable relationship." (JA 25). The Tribe has also assisted federal authorities by setting up roadside check points for the enforcement of federal and tribal wildlife laws.

The District Court found that "[n]either the State nor the Tribe can lay claim to a program of wildlife management without crediting federal agencies with some financial aid and management assistance." (JA 72). The State has received the bulk of the money necessary to finance its fisheries projects through the Dingell-Johnson Act, 16 U.S.C. § 777.[21] "Federal agencies like the BIA,

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[20] Congress specified $100,000 for the tribal game, fish and parks program in both 1989 and 1990, and those funds became part of the base budget in 1991.

[21] The State's fish-stocking programs must be understood in context. The State's own specialist in charge of fisheries testified that the principal fisheries on the Oahe Reservoir in South Dakota are walleye, salmon, and to a lesser extent northern pike and smallmouth bass. Trial Tr. at 38. The northern pike flourished only for a time just after the closing of the dam gates because of the natural habitat created by the flooding of the bottom lands. *Id.* at 39. The salmon live primarily in cold water habitat in the lower third of the Oahe outside the reservation, and smallmouth bass were not shown to have been established in reservation waters. Thus, according to State officials, only the walleye is an important fish in reservation waters. *Id.* at 252, 305-06. The walleye is native to, and spawns naturally in, the Grand River on the Standing Rock Reservation, and the Cheyenne and the Moreau Rivers on the Cheyenne River Reservation. *Id.* at 39-40. Walleye were sustained by natural reproduction for many years, and the State did not begin stocking walleye until 1983. Even since the stocking began, natural walleye reproduction remains far more significant than State stocking. In the upper half of the Oahe Reservoir, the walleye fishery is primarily replenished by natural reproduction and the State estimates a harvest of 200,000 to 250,000 walleye annually. *Id.* at 85; Trial Exh. 172 at 5. The projected walleye harvest in the lower half of the Oahe

the U.S. Fish & Wildlife Service, and the U.S. Army Corps of Engineers cooperate with state and tribal governments in promoting fish and wildlife conservation and public recreation." (JA 71).

G. This Litigation.

In 1988, during negotiations to renew the state-tribal wildlife management agreement, the State refused to recognize the significance of tribal grazing rights in the taken area, and refused to acknowledge that tribal buffalo and grazing stock must be protected from hunting activities. Trial Tr. at 662-63. In the absence of an agreement, the Tribe announced its intentions to enforce tribal hunting and fishing regulations on the taken area. The State then initiated this litigation.

SUMMARY OF ARGUMENT

This case presents the narrow question whether the Cheyenne River Sioux Tribe may continue to license hunting and fishing by non-Indians on reservation land, where the Tribe has always regulated such activity, after ownership of that land — although not all other interests in it — has been acquired by the United States for a flood control project. Precisely how tribal fish and game ordinances are to be civilly enforced on the taken area, and whether by the United States or the Tribe itself, and whether the State of South Dakota may enjoy concurrent jurisdiction, are issues not presented here.

It is undisputed that the Tribe lawfully and responsibly exercised conservation and licensing power prior to the taking of the land by the Cheyenne River Act in 1954. The Tribe's pre-existing, traditional power to regulate hunting and fishing was confirmed by Congress in the Indian Reorganization Act of 1934 and vested in the Tribal Council. Neither the Flood Control Act of 1944 nor the Cheyenne River Act of 1954 even addressed the issue of tribal licensing power on the taken area, let alone purported to divest the Tribe of such authority.

Reservoir where the State stocks the fish is only 30,000 to 35,000 fish, Trial Tr. at 84; Exh. 172 at 5, and the walleye eggs that are developed by the State as hatchery fish in fact come from the Cheyenne, Moreau, and Grand Rivers on the Standing Rock and Cheyenne River Reservations. Trial Tr. at 52.

The purposes of this legislative regime were to acquire the land necessary for flood control projects on the Missouri River and to rehabilitate the Tribe and to compensate it fully, so as to minimize the impact of the dramatic displacement wrought by the construction of the Oahe Reservoir. To that end, the United States acquired only those interests in the land necessary for its flood control projects and reserved many other rights to the Tribe. There is nothing about continued tribal licensing jurisdiction over the taken lands that is in any way incompatible with the federal government's flood control program, and, indeed, the recognition of such tribal power promotes the rehabilitation of the Tribe and tribal government that was Congress's other legislative goal.

Moreover, reading the Cheyenne River Act to divest the Tribe of authority to license hunting and fishing on the taken area would raise serious questions. The United States held the land in question in trust for the Tribe, and it therefore bore the duty of a trustee to specify precisely which interests and benefits the Tribe was losing when the United States proposed to acquire the land for its own purposes. Yet there was never any indication in the negotiations or congressional hearings that the Tribe would forfeit its right to license hunting and fishing on the taken area and thereby lose the valuable source of revenue that right represented. Nor was any compensation paid for the loss of this revenue stream, in contrast to the itemized compensation the Tribe received for the loss of grazing permit revenue wrought by the inundation of valuable river bottom land. Therefore, reading the Cheyenne River Act to divest the Tribe's right to license hunting and fishing could well create a claim for an uncompensated taking against the United States. That result would be particularly bizarre, since the United States, as the only other party to the transaction sealed by the Cheyenne River Act, now appears before this Court to agree with the Tribe that that statute did not divest the Tribe of its licensing power over the taken area. The contrary, third-party opinion of the Petitioner is entitled to no weight.

Recognizing that the Tribe retains the regulatory power over wildlife that Congress confirmed in the Indian Reorganization Act would thus comport with the principles this Court has long applied to interpret Indian treaties and statutes. This Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492

U.S. 408 (1989), did not question those settled rules of construction, and turned on the operation and effect of a federal law, the Allotment Act, which is not implicated here.

Tribes were held to have lost regulatory power over non-members in *Montana* and *Brendale* because the land in question had been alienated in fee simple to non-member settlers, and the continued exertion of tribal regulatory authority over them on their own land could not be reconciled with the Allotment Act's goal of extinguishing all tribal jurisdiction and governing power. In stark contrast, the Cheyenne River Act at issue here alienated certain interests in the taken lands to the United States, not to private settlers, and one of the Act's primary goals was to enhance and rehabilitate the Tribe, not to dissolve it. Petitioner's contention that *Montana* dictates a reversal in this case amounts to an attempt to extract dicta from the particular factual context of that opinion and to generalize it into a new field theory for tribal civil regulatory authority over non-Indians.

ARGUMENT

I. THE TRIBE HAS AUTHORITY TO REGULATE HUNTING AND FISHING BY NON-INDIANS ON THOSE PORTIONS OF THE FLOOD CONTROL AREA THAT LIE WITHIN THE CHEYENNE RIVER SIOUX RESERVATION.

A. At Issue Is Only the Tribe's Authority To Set Substantive Terms On Which Hunting and Fishing May Occur On Federal Land Within the Reservation; This Case Presents No Question About the Processes Through Which or The Forums In Which Tribal Regulations May Be Enforced.

It is important to note what is *not* at issue in this case, particularly since this is in some respects obscured by Petitioner's Brief. *First*, this case does not present the issue of tribal regulatory jurisdiction over conduct on land owned in fee by non-Indians, which was presented in *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Here, the District Court held that the Tribe has no "authority to regulate non-Indian

hunting and fishing on non-Indian fee land," and the Tribe did not appeal that portion of the decision. (A14).

Second, this case presents no issue of tribal jurisdiction over hunting and fishing by non-member Indians on the taken area or on non-member fee lands. (A18). Despite the District Court's ruling on this issue, and the occasional confusion in the Petitioner's Brief between non-Indians and non-member Indians (Indians who are not members of the Cheyenne River Sioux Tribe) (Pet.Br. 21 n.13, 23 n.14, 24), the Court of Appeals correctly noted that the "issue of tribal jurisdiction over non-member Indians was neither pled nor tried; the complaint was limited to the question of jurisdiction over non-Indians." (A18). Accordingly, the Eighth Circuit vacated that portion of the trial court's decision. (A51). Petitioner did not seek certiorari on this ruling.

Third, this case raises no issue of Tribal Court criminal jurisdiction over non-Indians. The District Court dismissed Petitioner's claims concerning tribal criminal jurisdiction (JA 37, 88), because the court found there was no evidence that the Tribe had ever imposed criminal sanctions against a non-Indian for violating tribal fish and game ordinances (JA 66), and because both the Tribe (JA 85) and the Tribal Court (JA 87) have consistently disavowed criminal jurisdiction over non-Indian hunting and fishing.

It is crucial to recognize that, as the Question Presented states on its face, only tribal authority "*to regulate*" the terms of non-Indian hunting and fishing on the taken area is at issue here. This case presents no question of how or in what forum tribal fish and game license requirements or other ordinances may be *enforced*. This distinction between licensing power and enforcement jurisdiction is familiar in Indian law. For example, it is settled that violations of Sioux hunting and fishing ordinances by non-members on the taken areas of the Missouri River are subject to federal prosecution under the Lacey Act, 16 U.S.C. § 3372, without regard to whether the particular tribe itself could undertake enforcement in its own courts. *United States v. Big Eagle*, 881 F.2d 539, 540-42 (8th Cir. 1989), *cert. denied*, 493 U.S. 1084 (1990). *See also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 342 n.27 (1983)(tribe may refer non-member violations of its game and fish ordinances to

federal enforcement officers).[22] For more than half a century, the Tribe has expressly relied on the federal government for assistance in enforcing substantive tribal hunting and fishing laws. *See* Tribal Ordinance No. 3 (1937)(JA 158).

Accordingly, the *fourth* question this case does *not* present is any issue about the scope of Tribal Court civil enforcement of hunting and fishing regulations. In this respect Petitioner's Brief is especially misleading. Petitioner raises the specter of draconian tribal civil penalties on sportsmen (Pet.Br. 29-30 & n.22), alludes to the possibility of exclusionary regulations (Pet.Br. 29-30), and attacks the integrity and fairness of tribal courts (Pet.Br. 25 & n.18), while ignoring the District Court's undisputed finding that the Tribe has never "imposed severe or unfair penalties on non-Indian" violators. (JA 19-20).[23] Moreover, the Court of Appeals correctly

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[22] The Lacey Act makes it unlawful for any person to acquire or sell any fish or wildlife taken in violation of federal law or in violation of any Indian tribal law. 16 U.S.C. § 3372(a)(1). The defendant, Big Eagle, a member of the Crow Creek Sioux Tribe whose reservation is on the eastern shore of the Missouri River, was caught fishing without a license west of the mid-point of the river channel, which is the boundary for the Lower Brule (a Sioux tribe) Reservation on the western side of the Missouri. 881 F.2d at 540. Since prosecution could in any event be had in a federal court under the Lacey Act, *Big Eagle* held that "the crucial inquiry is whether the acts complained of took place within the Reservation and not, as [defendant] Big Eagle insists, whether the Lower Brule Tribe *itself has the power to prosecute*." *Id.* at 541 (emphasis added). Lower Brule Tribal law included an arrangement with the State of South Dakota whereby anyone fishing with a net in this portion of the river had to have either a state or a tribal license. *Id.* at 541. The violation of this incorporated arrangement provided the predicate for federal jurisdiction under the Lacey Act: "We hold that Big Eagle violated *tribal law* by failing to obtain either a state or tribal permit as required by the settlement agreement." *Id.*, at 542 (emphasis added).

[23] This Court has never countenanced such assaults on the perceived deficiencies of tribal courts as a basis for restricting tribal civil jurisdiction. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978). *See also Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 18-19 (1987) ("We have rejected similar attacks on tribal court jurisdiction in the past. The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement."). In particular, Petitioner's purported concern about the Tribal Court being subordinate to the political branches of tribal government is misinformed. The Constitution of the Cheyenne River Sioux Tribe, as approved by the Secretary of Interior, mandates separation of powers by expressly providing that the Tribal Council may not review decisions of the Tribal Courts. Chey.R.Sx. Const. Art. IV, § 1(k) (1992). Finally, we note that the Tribe's three appellate

noted that, under the case as pled in the complaint and tried before the District Court, "[t]he scope of the Tribe's regulations are [*sic*] not presently at issue," and this case therefore does not present any question regarding the Tribe's power to discriminate against non-Indian sportsmen or to exclude them altogether. (A43).[24]

Federal judicial speculation in this case about the nature and scope of civil enforcement of hunting and fishing regulations in the Cheyenne River Sioux Tribal Court would be premature. As this Court has unanimously held, the complex issue of "the existence and extent of a tribal court's jurisdiction" should be addressed "in the first instance in the Tribal Court itself." *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 855-56 (1985)(abstaining in favor of civil suit between Indian and non-Indian in tribal court asserting jurisdiction to regulate conduct of non-Indian on state land).[25]

Fifth, and finally, this case does not present the question whether the State of South Dakota has any regulatory authority over non-Indian fishing and hunting in the taken area. The District Court found that South Dakota "made no attempt to show how its interests would be injured [even] if the Tribe were to exercise exclusive jurisdiction over the areas in dispute." (JA 108). But, while

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court justices include Professor Robert Clinton, whose treatise on Indian Law has been relied upon by this Court, and Professor Frank Pommersheim of the University of South Dakota School of Law.

[24] Petitioner also objects that tribal civil licensing power over non-Indians amounts to un-American regulation without representation. Pet.Br. 23-26. The Court has often heard and rejected this argument before. *See, e.g., United States v. Mazurie*, 419 U.S. 544, 557-58 (1975). Tribal authority is always subject to limitation and adjustment by Congress, *id.*; the Tribe's wildlife ordinances were reviewed and approved by the Secretary of the Interior; and non-Indians can petition the Tribal Court for relief. In any event, Petitioner's argument proves far too much: if a polity could not subject non-members to its licensing rules within its territory, then South Dakota would not be able to justify applying its own hunting and fishing rules to Nebraskans and others who are not represented in the South Dakota legislature.

[25] *See also Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 16 (1987)("Adjudication of such matters by any non-tribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law."). The Tribe pressed the *Nat'l Farmers Union* exhaustion argument in both the District Court (JA 86) and the Eighth Circuit. (Tribe's Opening Br. at 41; Tribe's Reply Br. at 28).

Petitioner emphasizes its argument for exclusive state regulation (Pet.Br. 26-28) — as an alternative to concurrent jurisdiction with the Tribe — that issue is simply not before this Court, for Petitioner failed to plead the issue in its complaint or to try it in the District Court. (A20 n.13; JA 107-08).[26]

In sum, much of what the Petitioner argues to this Court is utterly irrelevant, and many of the issues that Petitioner presses as vital elements of its vision for wildlife management on and about the Oahe Reservoir are simply not before the Court.

B. The Cheyenne River Sioux Tribe Historically Possessed and Exercised Congressionally Confirmed Power To License Hunting and Fishing On the Flood Control Area.

1. Historical Antecedents: The Tribe Owned the Western Half of the Bed and the Western Bank of the Missouri River.

The aboriginal territory of the Sioux Nation included the Missouri River, its tributaries, and adjacent riparian lands. In the Fort Laramie Treaty of 1868, the United States established the Great Sioux Reservation and expressly recognized the Sioux Nation's ownership of the bed and banks of the Missouri River as part of the peace settlement that concluded the Powder River War.[27] The

[26] Assuming *arguendo* that South Dakota has concurrent jurisdiction over the taken area, Petitioner's alarm about unworkable "checkerboard" wildlife licensing, Pet.Br. 27-28, is unsupported in the record. Petitioner did not even request a finding of fact on this issue, and District Court in fact concluded, based on the testimony of South Dakota's own wildlife officials, that its management program has been unimpaired by the mix of state and tribal control and that state and tribal game wardens work well together. (JA 24-25). *See also* A48. As this Court has frequently admonished, Petitioner's policy concerns should be addressed to Congress. *County of Yakima v. Yakima Indian Nation*, 112 S.Ct. 683, 692 (1992); *Duro v. Reina*, 110 S.Ct. 2053, 2066 (1990).

[27] The United States desired to secure passage for settlers in route to the Oregon territory and to end the Powder River War, which it was losing. *See* page 2 & note 3, *supra*. The resolution of the conflict and the formation of the Great Sioux Reservation therefore presented a public exigency, *United States v. Sioux Nation*, 448 U.S. 371, 374-76 & n.4 (1980), and this case must be distinguished from *Montana v. United States*, 450 U.S. 544, 556 (1981), where "the Crow Indians . . . presented no 'public exigency.'"

Treaty of 1868 reserved "the following district of country . . . *commencing on the east bank of the Missouri River* . . . thence along *the low water mark on the east bank* of the Missouri River," and crossing the river to include all of western South Dakota up to the 104th meridian. Treaty of 1868, Art. 2 (emphasis added); *Sioux Tribe v. United States*, 316 U.S. 317, 319 (1942).[28]

When the Cheyenne River Reservation was created by the division of the Great Sioux Reservation in 1889, Congress set its eastern border at the "center of the main channel of the Missouri River, including also entirely within said reservation all islands" in the river. 25 Stat. 888.[29] In 1954, during hearings on the bill to acquire Indian lands for flood control, Congress and the Army Corps of Engineers acknowledged that the Tribe owned the western half of the bed of the Missouri River. Joint Senate-House Hearings at 98 (1889 Act leaves "no doubt at all of the Indian ownership") (remarks of Rep. Berry). Accordingly, Congress compensated the Tribe in the Cheyenne River Act for "the bed of the Missouri River so far as it is the eastern boundary of said Cheyenne River Reservation" and for the islands in the river. Public Law 776, § II (JA 236). Moreover, the Act expressly reserved mineral rights in the western bed and bank of the Missouri River to the Tribe. (JA 240). Petitioner has never contested that the Tribe owned the western half of the bed and the western bank of the Missouri River.[30]

[28] Far less precise language has been held "expressly" to convey title to the bed of a navigable river. *Compare Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635 (1970) (holding that "the middle of the main channel" was an express grant); *with Packer v. Bird*, 137 U.S. 661, 672 (1891) (holding that a grant of land bounded by the *near* bank did not convey islands in the bed of a navigable river, but that the bed and banks may be conveyed if terms of grant embrace "the land under the waters of the stream").

[29] Later that year, the State of South Dakota disclaimed all right and title to lands held by Indians, and acknowledged the federal government's exclusive jurisdiction over Indian lands. S.D. Const. Art. XXVI, § 18.

[30] Petitioner makes a passing allegation in a footnote that tribal ownership of this part of the river bed "is not a closed issue," Pet.Br. 34 n.25, but offers neither argument nor authority on the matter.

2. The Original Authority of the Cheyenne River Sioux Included the Power to Regulate Hunting and Fishing.

The Sioux Nation regulated wildlife resources under its original authority as an Indian tribe. Access to and control of wildlife was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). Tribal regulation of hunting was vital to the very survival of the Sioux. On a buffalo hunt, for example, a hunter who attacked ahead of the main hunting party could spook the herd and spoil the chance for a successful hunt by the tribe as a whole. Each hunter was therefore required to wait for the leader's signal, and no more game was taken than was needed. Hunting rules were enforced against *anyone* in tribal territory.[31]

Although the Fort Laramie Treaty of 1868 vested the United States with criminal authority over interracial crimes throughout the Great Sioux Reservation, *Ex Parte Crow Dog*, 109 U.S. 556, 562-63 (1883), it did not disturb the Sioux Nation's civil authority over non-Indians. *Cf.* 7 Op. Atty. Gen. 175 (1855). In the fall of 1868, General Harney, the commanding officer of the Sioux Indian District and a signatory to the Fort Laramie Treaty, 15 Stat. 635, told Sioux Chief Tall Mandan, another signatory, that the Chief had the authority to enforce the Sioux "social laws" against "anyone, white or Indian." Trial Exh. 93 at 3.

As the Senate Judiciary Committee explained in 1879, Indian tribes are "invested with the right of self-government and jurisdiction over persons and property within the limits of the territory they occupy, *except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress*." S.Rep. No. 698, 45th Cong., 2d Sess, 1-2 (1879) (emphasis added), *quoted in Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1983). The Senate's view of tribal authority confirms the earlier views of the Attorney

[31] *See* S. Pond, *supra*, at 46 (Gov. Henry Hastings Sibley subject to rules); *cf.* K. Llewellyn & E. Hoebel, THE CHEYENNE WAY 111-13 (1987)(the Cheyenne Indians applied similar rules to Dakota Indians among them); *see also* R. Hassrick, *supra*, at 176-78 (rules applied to antelope hunt).

General.[32] Against this background, it is clear that in 1934 the Cheyenne River Sioux Tribe retained, as a part of its original authority, confirmed by treaty and federal legislation, the power to regulate all hunting and fishing on the Indian lands adjacent to and underlying the Missouri River. Fort Laramie Treaty of 1868; 1877 Act.[33]

3. Through the Indian Reorganization Act of 1934, Congress Confirmed the Tribe's Existing Authority to License Hunting and Fishing.

Congress enacted the Indian Reorganization Act (IRA) in 1934 with the specific purpose of encouraging Indian tribes to revitalize their tribal governments. S. Rep. No. 1080, 73rd Cong., 2d Sess., 1 (1934); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 n. 5 (1987). Through the IRA, Congress provided for constitutional organization of tribal governments, and expressly authorized those tribal governments to exercise "all powers vested in any Indian tribe . . . by existing law." 48 Stat. at 987; 25 U.S.C. § 476. The IRA embodied President Roosevelt's new policy of extending to Indian

[32] In addressing the authority of a tribal court in a case involving non-Indians, Attorney General Cushing declared that "there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this. . . . such questions . . . remain subject to the local jurisdiction of the Choctaws." 7 Op. Atty. Gen. 175, 179-81 (1855), *quoted in National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 854-55 (1985).

[33] Even the General Allotment Act of 1887 did not disturb tribal jurisdiction over Indian trust land. *See Montana v. United States*, 450 U.S. at 557. Allotment legislation has no bearing on nearly all of the territory at issue in this case, the 104,000 acres acquired from Indians and the Tribe itself, which were not alienated under that Act. The only conceivable relevance of the Allotment Act policy to this case might be with respect to the remaining 18,000 acres of the taken area, acquired from non-Indians under the Flood Control Act of 1944. The record does not reveal how these lands fell into non-Indian ownership. Accordingly, the Court of Appeals remanded to the District Court to determine the fate of tribal licensing power over these lands under the *Montana* standard. (A45-46). Yet the Tribe sees no reason why any suspension of congressionally confirmed tribal licensing power wrought by alienation of this land should continue once that land has been reacquired by the United States. Surely any supposed taint of any policy lurking behind the original alienation by the Tribe of those 18,000 acres has been erased, and the relevant policy is now that of the Flood Control Act and the Cheyenne River Act, pursuant to which the land was taken by the United States.

tribes "the fundamental rights of political liberty and *local self-government*." S. Rep. No. 1080, at 3 (emphasis added). Congress intended the IRA to "stabilize the tribal organization of Indian tribes by *vesting* such tribal organizations with real, though limited authority." *Id.* at 1 (emphasis added). To the extent that any given tribal power was an attribute of sovereignty possessed by Indian tribes when the IRA was passed, Congress intended the statute to preserve those powers for all Indian tribes that adopted a formal organization under the Act. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 n. 6 (1978)("the tribal council is intended to have such powers as are vested 'by existing law'"). In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 n. 20 (1983), this Court held that tribal licensing authority over hunting and fishing on Indian land was among the "existing powers" of Indian tribes "confirmed" and "'vested'" by the IRA.

Shortly after the passage of the IRA, the Solicitor of the Department of the Interior identified definitively the "existing powers" expressly acknowledged by Congress in the IRA. *Powers of Indian Tribes*, 55 I.D. 14 (1934). The Solicitor's opinion found that Indian tribes retained all of their original powers which had not previously been *expressly* divested by treaty or act of Congress. 55 I.D. at 14-19. *See also* F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 439 (1958 ed.).[34]

The Cheyenne River Sioux Tribe accepted the provisions of the Indian Reorganization Act, and adopted a constitution and by-laws in 1935. Accordingly, the Tribe "preserved all powers conferred by § 16 of the Indian Reorganization Act." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 134 (1983). "Tribal power over reservation hunting and fishing was unquestionably vested prior to 1934." *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724, 732 (10th Cir. 1980), *vacated for reconsideration (in light of United States v. Montana)*, 450 U.S. 1036 (1981), *reinstated*, 677 F.2d 55 (10th Cir. 1982), *aff'd*, 462 U.S. 324, 337 (1983)(tribe retains "right to regulate the use of its resources by members as well as non-members. . . . [T]ribes in general retain this authority. . . .

[34] The Solicitor's 1934 opinion has been treated by this Court as definitively interpreting the IRA. *See, e.g., Merrion*, 455 U.S. at 139; *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980).

[T]his aspect of tribal sovereignty has been expressly confirmed by numerous federal statutes," citing the IRA). The Tribe's Constitution and By-Laws were approved by the Secretary of the Interior. Article VII, § 2 of the By-Laws authorizes the Tribal Council "to pass ordinances for the control of hunting and fishing upon the reservation," to "enforce such ordinances and cooperate with federal and state" conservation efforts, and to "issue licenses for hunting and fishing." (JA 281). The District Court found that after the passage of the IRA, "the Tribe enacted ordinances, . . . approved by the Bureau of Indian Affairs (BIA), which required non-members to obtain a tribal permit to hunt or fish on the reservation." (JA 65-66).

The District Court found that the Tribe promptly made significant progress in wildlife management in the 1930s and 1940s. (JA 73). Wildlife was an important source of both food and income; there was substantial sport fishing by both Indians and non-Indians, Trial Exh. 58; Indians "derive[d] considerable income from the sale of special licenses and by serving as guides" (JA 168-69); the abundance of small game attracted non-Indian hunters and necessitated Indian management efforts (JA 171); and tribal conservation measures restored the deer and antelope herds, enabling a hunting season for members and non-members as early as 1947. *See generally* pages 4-6, *supra*. Thus, the Cheyenne River Sioux Tribe's wildlife management program was a paradigm of the revitalized tribal government envisioned by Congress in the IRA, and John Collier, the Commissioner of Indian Affairs and a principal proponent of the IRA, commended the Tribe's wildlife management program as one of the ten best in the nation. Trial Tr. at 760.[35]

[35] Substantial benefits accrue to non-Indians as a result of the Tribe's wildlife regulation. In addition to the availability through the years of hunting opportunities created by the Tribe's restoration of game herds on tribal lands, the District Court found that, because there is little food or cover on the taken area, adjacent "tribal lands contribute to the well-being" of game herds on the taken area as well. (JA 70)("Virtually all the land adjacent to the taken area is [tribal] trust land."). Non-Indian sportsmen on the taken area also benefit from the Tribe's regulation of its own members, which prevents members from depleting the wildlife resources of the taken area and the reservation as a whole, preserving recreational opportunities for all. (The District Court found that effective wildlife management, whether concurrent or uniform, must encompass the entire reservation. (JA 70)). It is only equitable that non-Indian sportsmen support, through license fees, the tribal

In its 1948 report, HUNTING AND FISHING RIGHTS OF INDIANS ON THEIR RESERVATIONS, the BIA confirmed that, "unless [a] treaty *specifically surrendered* hunting and fishing rights, they *and their control* remained *absolutely* in the Indian Tribe, without power of the State or Federal Government to interfere therewith, without the consent of the Indians." Trial Exh. 93 at 17 (emphasis added). "Each case would require an independent study of the controlling instruments." *Id.*

Thus, when Congress began the process of acquiring the Indian lands on the Cheyenne River Sioux Reservation necessary fo. the construction of the Oahe Reservoir, the Tribe had the right and authority, *confirmed by Congress* and *approved by the Secretary of the Interior*, to license hunting and fishing by both tribal members and non-members on the tribal and individual Indian trust lands which later became the taken area.

The factual background prior to the Cheyenne River Act, *as reported by agencies of the United States*, was that: 1) the Tribe was in fact licensing both tribal member and non-member hunting and fishing on tribal lands and waters; 2) the Tribe had an exemplary wildlife management program, including a successful big game management strategy which restored big game herds on the reservation; 3) "Indians and Whites" both did sport fishing, and license revenue was significant on reservations in the Lake States and the Dakotas; and 4) wildlife resources were an important source of food and cash income for poverty-stricken tribal members on the Cheyenne River Sioux Reservation.

Accordingly, the District Court found that "the Tribe has always asserted jurisdiction over hunting and fishing activities on the reservation," including "the taken area," and that "[t]he Tribe has not acquiesced to any state assertion of jurisdiction over hunting and fishing activities on the reservation." (JA 65).

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conservation and management programs from which the non-Indians, like all others who come to the area, directly benefit. *Merrion*, 455 U.S. at 137-38.

C. SETTLED PRINCIPLES OF LAW DICTATE THAT A TRIBE MAY BE DIVESTED OF RIGHTS SECURED BY TREATY OR STATUTE ONLY BY A CLEAR MANIFESTATION OF CONGRESSIONAL INTENT.

1. The General Rule of Construction in Indian Law Is That Ambiguities Are To Be Read in The Tribe's Favor.

As the Court recently observed, it is "a principle deeply rooted in this Court's Indian jurisprudence" that "'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *County of Yakima v. Yakima Indian Nation*, 112 S.Ct. 683, 693 (1992)(quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)). In particular, the Court has "required that Congress' intention to abrogate Indian treaty rights be clear and plain." *United States v. Dion*, 476 U.S. 734, 738 (1986). *See also Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979). This Court does "not construe statutes as abrogating treaty rights in 'a backhanded way.'" *Dion*, 476 U.S. at 739. In the absence of an explicit divestiture, there must be "'clear indications' that Congress has implicitly deprived the Tribe of its power." *Merrion*, 455 U.S. at 152.

2. The Special Trust Relationship Between A Tribe And The Federal Government Requires That Statutes Or Agreements Alleged To Divest Tribal Rights Be Read In Favor Of The Tribe.

"The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). The United States acknowledged this protectorate relationship with the Teton Sioux as early as 1815, in its first treaty between the two nations. Treaty with the Teton of 1815, 7 Stat. 125. Because the United States "assumes the responsibilities of virtual guardianship, bound by every moral and equitable consideration to discharge its trust with good faith and fairness," *United States v. Payne*, 264 U.S. 446, 448-449 (1924), its conduct must

"be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

The trust relationship is no mere metaphor in this case, because "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian [tribe]), and a trust corpus (Indian . . . lands)." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). *See also United States v. Mitchell*, 445 U.S. 535, 547-48 (1980)(White, J., dissenting)(same); *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987)("It is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity"). The lands acquired by the Cheyenne River Act had been held in trust for the Tribe and its members by the United States, and since that land was acquired by the trustee not to benefit the Tribe but for the United States' own reservoir project, there was a legitimate concern about self-dealing.

In these circumstances, a trustee has a duty fully to disclose the nature and value of the interests to be acquired and to compensate the beneficiary in full. *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937) (Cardozo, J.)(government trust power over tribal lands "does not extend so far as to enable the Government . . . 'to appropriate them to its own purposes, without rendering . . . just compensation'"); *United States v. Sioux Nation*, 448 U.S. 371, 408-409, 415 (1980)(quoting and applying *Shoshone Tribe*); G. Bogert, THE LAW OF TRUSTS AND TRUSTEES §542 (1978 & Supp. 1992) (duty of "utmost frankness and fair play"). The United States declared its intent to fulfill this obligation during the Senate Hearings on the acquisition. 1950 Senate Hearings at 4 (United States would undertake a complete analysis of all the interests and rights to be taken); *id.* at 6 ("Indians to be taken care of completely")(remarks of Sen. Gurney).

3. Principles Of Contract Law Require That Agreements Between Tribes And The Federal Government Be Read As Those Parties Themselves Read The Agreements.

Among the most basic principles of contract interpretation is that "[t]he parties themselves know best what they have meant by their words of agreement." Official Comment 1 to U.C.C. ¶ 2-208. *See*

also WILLISTON ON CONTRACTS § 623 (3d ed.). "Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning." Restatement (2d) of Contracts, § 201(1). The force of the parties' mutual interpretation has even been termed "conclusive." *Sunbury Textile Mills, Inc. v. Commissioner of Internal Revenue*, 585 F.2d 1190, 1196 (3d Cir. 1978).

"Accordingly, it is the intention of the parties . . . that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule." *Washington State Commercial*, 443 U.S. at 675. The Court applied this rule in *Winters v. United States*, 207 U.S. 564 (1908), which presented the question whether the tribes retained water rights in an agreement ceding large portions of the reservation to the United States. The Court framed the issue as one of contract interpretation, *id.* at 575, and noted that the parties, the United States and the tribes, contended that their agreement implicitly reserved the tribes' water right "to the full extent in which it had been vested in them under former treaties," *id.* at 573, while third-party strangers to the agreement contended that the tribes' failure to expressly reserve those rights acted as a forfeiture. *Id.* at 571. The Court was swayed by the United States' and tribes' joint insistence as to the meaning of their contract, and refused to "believe that the Indians were awed by the power of the government or deceived by its negotiators." *Id.* at 576. The tribe's and the government's jointly negotiated and jointly held interpretation of their agreement prevailed: "The Government is asserting the rights of the Indians." *Id.* at 576.[36]

If even the federal government "[o]bviously . . . must man the laboring oar in any effort to contradict the stated intent of the parties" when only a routine private contract to which the government is a stranger is at issue, *Sunbury Textile Mills*, 585 F.2d at 1197, *a fortiori* a third-party such as the Petitioner bears an onerous

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[36] Although *Amici* States discuss only the category of substantive tribal right at issue in *Winters* — usufructuary rights necessary to life on the reservation, *see Brief Amici Curiae of Montana et al.* at 6 n.1 — Justice McKenna's characterization of the determinative issue in the case makes clear that the holding in *Winters* is based on the interpretive principles discussed in the text above, and not on the particular water right that happened to be at issue.

burden when the issue is an agreement negotiated by the United States in its solemn capacity as trustee for an Indian tribe.

4. Neither *Montana* Nor *Brendale* Purported To Rewrite These Established Rules Of Construction.

Petitioner wholly ignores the foregoing body of precedent, and dismisses as irrelevant this Court's well-established principles requiring clear evidence of congressional abrogation of Indian treaty rights, describing these clear evidence rules as alien to and inconsistent with what Petitioner supposes to be a distinct and controlling line of authority: *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). *See* Pet.Br. 35-36 (discussing *United States v. Dion*, 476 U.S. 734 (1986)). To be sure, this Court has "not rigidly interpreted that preference [for an express congressional statement] as a *per se* rule," *Dion*, 476 U.S. at 739, and has looked beyond the face of an act and relied on "'legislative history' and 'surrounding circumstances'" when such evidence of abrogation "is sufficiently compelling." *Id.* But neither *Montana* nor *Brendale* questioned — let alone repudiated — the venerable principles of Indian law statutory construction and treaty interpretation elaborated above.[37]

Although it never deigns to mention the other pertinent Indian law interpretive doctrines, Petitioner ultimately relents and concedes at least that *Montana* and *Brendale*, like *Dion* (which affirmed the "clear evidence" rule), all involve application of a standard for determining when tribal rights "may be divested." Pet.Br. 36. Yet Petitioner oddly contends that the standard this Court applies for divesting tribal rights to engage in "*nongovernmental activity*" is "*more* stringent" than the standard for abrogating the tribe's "*governmental authority*" itself. Pet.Br. 36 (original emphasis). If

[37] *See, e.g., Montana*, 450 U.S. at 567-68 & n.1 (Stevens, J., concurring)(discussing doctrine that ambiguities must be resolved in favor of Indian tribes but finding it insufficient on facts of that case to sustain tribal ownership of riverbed); *id.* at 569, 581 n.18 (Blackmun, J., dissenting in part)(arguing that the Court misapplied doctrine with respect to riverbed issue, but concurring in the Court's resolution of tribal power to regulate hunting and fishing by non-Indian settlers on land they own in fee simple).

any such distinction is to be made, surely Petitioner has it backwards. Because "the Federal Government [is] firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes," this Court has "held that tribes have the power to manage the use of their territory and resources by both members and non-members . . . [and] to undertake and regulate economic activity within the reservation." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983)(Marshall, J., for a unanimous Court). *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980)("Ambiguities . . . have been construed generously in order to comport with these traditional notions of [Indian] sovereignty and the federal policy of encouraging tribal independence"). Although in some cases that goal and those tribal powers may be abrogated by operation of a countervailing statutory policy, nothing in *Montana* or *Brendale* — or in any other authority offered by Petitioner — requires that the judicial determination of whether tribal treaty rights have been divested be made without reference to the principles of interpretation that have guided this Court's Indian law jurisprudence for 150 years. We now turn to the application of those settled principles to the facts of this case.

D. No Federal Statute or Treaty Divests the Tribe of Power To License Hunting and Fishing On Those Portions of the Flood Control Area That Lie Within the Reservation.

1. The Flood Control Act of 1944 Did Not Divest the Tribe of Licensing Power.

The courts below were unanimous that neither the text of the Flood Control Act nor its legislative history even mentions tribal jurisdiction or tribal regulatory authority. (JA 134-35; A28-30 & n.15). The Eighth Circuit has twice considered the Flood Control Act and twice concluded that "there is simply no indication in the legislative history that Congress even considered Indian rights when it adopted Section 4." (A30); *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 825 n.23 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). The Act certainly does not satisfy the requirement of a clear expression of congressional intent to limit tribal sovereignty or to abrogate treaty rights. Therefore, the Act's

silence can only mean that tribal authority remained unaffected by the Flood Control Act. (A29-30).

Indeed, insofar as Congress considered Indian tribal rights in enacting the Flood Control Act, Congress made clear its intention to *preserve* those rights. (A29 n.15). To the extent that the Flood Control Act's twin purposes — irrigation and flood control — touched upon Indian rights, Section 9(c) preserved the *status quo ante*: "irrigation of Indian trust and tribal lands, and repayment therefor, *shall be in accordance with the laws relating to Indian lands*." Flood Control Act of 1944, Pub.L.No. 534, Section 9(c), 58 Stat. 891 (emphasis added).[38]

Petitioner nevertheless contends that Section 4 of the Flood Control Act necessarily stripped the Tribe of licensing authority, because Section 4 directed that the "water areas of all such reservoirs shall be open to public use generally . . . [for] recreational purposes . . . when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary." (A186).

This section, however, does not even purport to address Indian civil regulatory authority. Nor is the purpose of Section 4 inconsistent with tribal regulation. Even Petitioner must agree that fishing and hunting depend on regulation and conservation for their continued viability. *Cf. Puyallup Tribe v. Department of Game of the State of Washington*, 414 U.S. 44, 49 (1973); *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978). It is inconceivable that Congress intended to strip those tribes which have hunting and fishing rights along the Missouri River of the regulatory authority necessary to maintain those very rights through

[38] Likewise, Congress was told during pre-enactment hearings by the Corps of Engineers that tribal lands could not be acquired without satisfying the tribal council consent provisions in the IRA, 25 U.S.C. § 476, yet did nothing to override the IRA requirements. *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193, 197-98 (D.S.D. 1958) (quoting at length from Chief of Engineers' letter and finding that "this letter indicates that Congress recognized the special situation regarding the Indians and desired that some mutually agreeable plan be worked out"). Congress was thus clearly aware that the IRA imposed limitations on the Flood Control Act's operation and chose not to disturb settled Indian rights. *Id.* at 198. *See also United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002, 1005-06 (8th Cir. 1976)(holding that Flood Control Act did not authorize the condemnation of Indian lands absent the tribal consent required by treaty).

this oblique passage in Section 4 and without any direct examination of the issue.

Section 4 implicitly recognizes this uncontroversial precept by authorizing public use *only* "when such use" is conducted pursuant to "such rules and regulations as the Secretary of War may deem necessary." The Department of the Army's regulations not only *allow* for tribal regulation of hunting and fishing,[39] they *affirmatively establish* the primacy of tribal treaty rights over both public use rights and state and federal regulatory interests.[40]

Section 4 also provides that "[n]o use [of Flood Control reservoirs] shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is located." (A186). In *Lower Brule Sioux Tribe v. South Dakota*, the Eighth Circuit held that this language was not sufficiently directed at tribal rights to authorize state jurisdiction over tribal members on

[39] The regulations provide that: "Hunting, fishing and trapping are permitted except in areas where prohibited by the District Engineer. All Federal, state and *local* laws governing these activities apply on project lands and waters, as regulated by authorized enforcement officials." 36 C.F.R. § 327.8 (emphasis added). Furthermore, "state and *local* laws and ordinances shall apply on project lands and waters. This includes, but is not limited to, state and *local* laws and ordinances governing: . . . (b) Hunting, fishing and trapping. . . . These state and *local* laws and ordinances are enforced by those state and *local* enforcement agencies established and authorized for that purpose." 36 C.F.R. § 327.26 (emphasis added). Application of tribal law as one form of local law is no more inconsistent with those regulations and the Flood Control Act than regulation by any other government entity. The Tribe's laws fit the definition of "local law." *Talton v. Mayes*, 163 U.S. 376, 383-84 (1896) (tribal powers of government are local power); *United States v. Bald Eagle*, 849 F.2d 361 (8th Cir. 1988) (tribal law considered local "state" law for purposes of Assimilative Crimes Act, 18 U.S.C. § 13); *United States v. Big Eagle*, 881 F.2d 539 (8th Cir. 1989)(Violations of tribal hunting and fishing ordinances on the taken areas along the Missouri River are subject to prosecution under the federal Lacey Act, 16 U.S.C. § 3372); BLACK'S LAW DICTIONARY 939 (6th ed. 1990)("local law is one which relates or operates over a particular locality instead of over the whole territory of the state"); *Gallo v. Brown*, 446 F. Supp. 45, 47 (D.R.I. 1978); 18 U.S.C. § 1152 ("local law of the tribe").

[40] Corps of Engineers regulations provide that such tribal rights confirmed by treaty supersede the Corps' regulatory interests. 36 C.F.R. § 327.1(f) ("regulations . . . apply to those lands and waters which are subject to treaties and Federal laws and regulations concerning the rights of Indian Nations and which lands and waters are incorporated . . . within water resource development projects administered by the Chief of Engineers, *to the extent that the regulations . . . are not inconsistent with such treaties* and Federal laws and regulations")(emphasis added).

the taken area, and petitioner is collaterally estopped from asserting the contrary. 711 F.2d at 825-827 & n.23. The Eighth Circuit's holding in this case was simply the logical corollary of that ruling: if Section 4 is not directed to tribal rights, it cannot divest tribal authority previously confirmed by statute. (A29-30).

The language in Section 4 (A186) on which Petitioner relies to strip the Tribe of its congressionally affirmed licensing power is, as the Court of Appeals held, nothing more than an anti-preemption clause that protects state conservation laws. (A28-29); *Lower Brule*, 711 F.2d at 825 n.23. Congress did not intend to disrupt state conservation efforts by preempting their force through the Flood Control Act, and it said so. This Court has often recognized that anti-preemption clauses must be read narrowly and with care, *see, e.g., California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 295-96 (1987)(Scalia, J., concurring), and it is beyond cavil that Section 4 "does not remotely purport," *id.* at 296, to be an affirmative transfer of regulatory authority from tribes to states.[41]

2. The Cheyenne River Act of 1954 Did Not Divest the Tribe of Licensing Power.

The Court of Appeals and the District Court agreed that the Cheyenne River Act and its legislative history are silent concerning the issue of tribal licensing and regulatory authority over hunting and fishing on the taken portion of the Reservation. (A37-39; JA 127-130).[42] Settled rules of construction applicable both to tribal-federal contracts and to Indian law statutes direct the Court to the

[41] Arguably, this language allows states to promulgate conservation-oriented limits and licensing regulations with which non-Indians would have to comply, tribal regulation notwithstanding. In other words, a state may, *arguendo*, be able to set catch limits or other ceilings beyond which tribes could not authorize more permissive uses. However, the question of South Dakota's regulatory authority is not before this Court. *See* pages 19-20, *supra*.

[42] Even Petitioner's *amici* concede that "[a]t no place in the statutory language or in the legislative history of the [Cheyenne River Act or the Act of 1950] is there an explicit assertion that Congress intended to divest respondent tribe of regulatory authority over nonmembers on the taken area." Brief *Amicus Curiae* of the Int'l Ass'n of Fish and Wildlife Agencies at 24. The several states which appear as *amici* likewise eschew any attempt to argue that the Cheyenne River Act abrogated tribal licensing and regulatory rights. *See* Brief *Amici Curiae* of the States of Montana, *et al.*

conclusion that the Cheyenne River Act preserved the Tribe's pre-existing rights. *See* pages 27-30, *supra*. "[L]egislative repeals by implication will not be recognized, insofar as two statutes are capable of co-existence, 'absent a clearly expressed congressional intention to the contrary." *Astoria Federal Savings & Loan Ass'n v. Solimino*, 111 S.Ct. 2166, 2170 (1991). Since the text and history of the Cheyenne River Act do not address this regulatory issue, the Tribe's power must stand unless "'a statutory purpose to the contrary is evident.'" *Id.*

Far from being irreconcilable with the continued existence of the tribal power confirmed by the IRA, the purposes of the Cheyenne River Act support the conclusion that the Tribe retained its licensing power. One purpose of the Act was to provide for the "rehabilitation of the Indians of the Cheyenne River Sioux Reservation," (JA 234), "to the extent that the economic, social, religious, and community life of all said Indians shall be restored to a condition not less advantageous to said Indians than the condition that the said Indians now are in." (JA 239).[43] That purpose would clearly be promoted, rather than undermined, by allowing the Tribe to continue developing the remaining economic benefit derived from the taken area after the most fertile lands of the reservation were flooded.

The second purpose of the Act, acquisition of land for federal use (JA 234), is jurisdiction-neutral because, in the absence of express arrangements to the contrary, federal acquisition of territory "shall be conclusively presumed" to have no effect upon the jurisdictional status of the acquired land. 40 U.S.C. § 255. Moreover, no conflict or inconsistency inheres in allowing the Tribe to continue licensing hunting and fishing on the federally taken area within the Reservation, especially given the federal government's role in aiding enforcement of tribal fish and game ordinances under the Lacey Act, 16 U.S.C. § 3372(a)(1). *See* note 22, *supra*. The Cheyenne River Act conveys only "lands which are required by the United States for the reservoir." (JA 235). Extinction of the Tribe's

[43] Congress used the term "Indians" in the Cheyenne River Act to refer to the Tribe itself. Thus, for example, the Act conveys only lands "belonging to the Indians." (JA 235). Other portions of the Act carefully distinguish between "members of the Tribe" and the "Tribe" where such distinctions are necessary. (JA 241, 242, 244, 248).

licensing authority was not required by the United States to build the reservoir, nor for the flood control and irrigation uses to which the reservoir was to be put.[44]

Of course, the corollary to the acquisition was Congress' intention to compensate the Tribe completely for its lost interests. *See* JA 236; 96 Cong.Rec. at 15609 ("to the extent that these rights may be impaired or destroyed, the tribe is entitled to compensation apart from settlement with allottees"). That purpose too would fail if the Court were to rule against the Tribe, because such a ruling would leave the Tribe uncompensated for the loss of a valuable economic resource.

The Cheyenne River Act provided the Tribe no compensation whatever for the revenue stream arising out of the Tribe's licensing authority. This is in sharp contrast with the arrangement made for grazing permit revenue whereby the Tribe specifically sought (and received) compensation for its lost grazing permit revenue brought about by the flooding — in addition to the actual value of the flooded land.[45] Both parties to the negotiations deemed the loss of the resource *per se*, and the loss of the licensing revenue *derived* from that grazing resource, to be distinct. The fact that the Tribe, the federal negotiators, and Congress did not even consider compensation for the loss of revenue from sales of *hunting and fishing licenses* necessarily supports the view that the Tribe's ability to receive such revenue would, unlike grazing permit revenue, be

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[44] Section 2 of the 1950 Act, which set the framework for the transaction sealed by the Cheyenne River Act, authorized the United States to acquire only those "lands or interests . . . required by the United States for the reservoir." (A188). *See also* A36-37 n.17. Reading the Cheyenne River Act of 1954 to include a cession of licensing authority by the Tribe would therefore require the conclusion that the United States disregarded the statutory mandate of the 1950 Act.

[45] Grazing permit revenue lost as a result of the flooding is the *only* economic loss attributable to the Tribe's regulatory activity for which the Tribe was compensated. Grazing revenue was lost not because the Tribe lost licensing power *per se* over grazing rights, but because the *land itself* was lost to flooding. Therefore, the loss of grazing permit revenue is proof not of the Petitioner's claim that the Tribe was generally stripped by the Cheyenne River Act of all licensing power over the taken area, but only of the mundane fact that cows cannot walk — or graze — on water. Indeed, the United States Comptroller has determined that the Tribe has grazing permit authority over all of the taken area. Trial Ex. 277.

unaffected by the Cheyenne River Act and the inundation of portions of the taken area.[46]

Moreover, divesting the Tribe of a valuable economic resource without compensation would be a serious breach by Congress of its duty to compensate the Tribe for taken resources as set forth by this Court in *Shoshone Tribe of Indians*, 299 U.S. at 497, *United States v. Creek Nation*, 295 U.S. 103, 110 (1935), and *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 407, 413 (1968) (recognizing that the United States can be held liable for divesting tribal hunting and fishing rights without payment of compensation). *See* Joint Senate-House Hearing at 44 (Rep. D'Ewart recognized that the United States might be "liable" in future suits if Congress "set aside" the Tribal Constitution or treaties).[47]

Confronted with two possible constructions, courts are bound to choose the one which assumes that Congress acted properly. For example, in *Menominee Tribe, supra*, the tribe sought compensation for what it claimed was Congress' *sub silentio* divestiture of its tribal hunting and fishing rights through the Menominee Termination Act. The Court noted that the Menominee Termination Act, like the Cheyenne River Act, expressed Congress' intention that the Act settle "all financial obligations" between the Menominee Tribe and the United States and concluded that "[w]e find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property

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[46] Section 2(b)(1) of the 1950 Act provided for the payment of "just compensation for lands and improvements and interests therein conveyed." (A189). Since the Tribe was not compensated for the licensing revenue that Petitioner claims the Tribe has now lost, reading the Cheyenne River Act to include a cession of tribal licensing power would, again, require the conclusion that the United States ignored its obligations under the 1950 Act.

[47] The fact that other cases such as *Menominee* specifically concerned tribal rights to hunt and fish rather than tribal rights to *license* hunting and fishing is of no consequence. *Menominee* itself deemed hunting and fishing rights to have a regulatory element, insofar as the tribe's right to hunt and fish was held to encompass the right to do so free of regulation by the state. *See* 391 U.S. at 406-07. Furthermore, the Court's opinion in that case reveals that Indian hunting and fishing rights are often of a piece with Indian rights to license those activities on the reservation. *Id.* at 410-11 (discussing Pub.L. No. 280, which preserves "any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing *or the control, licensing, or regulation thereof.*")(emphasis added).

rights conferred by treaty, particularly when Congress was purporting by the Termination Act to settle the Government's financial obligations toward Indians." 391 U.S. at 413. *See also Leavenworth v. United States*, 92 U.S. 733, 742-43 (1876)("As the transfer of any part of an Indian reservation secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never granted it. . . . [I]f Congress really meant that this grant should include any part of the reservation of the Osages, it would at least have secured an adequate indemnity to them").[48]

Here, that rule leads to the unmistakable conclusion that Congress did not "take" the Tribe's licensing and regulatory authority *sub silentio* without compensation through the Cheyenne River Act, and that the Tribe's rights remain intact.[49]

In 1954 Congress labored in an era when contemporary doctrine favored tribal civil regulatory authority over non-members, regardless of the ownership status of the land within the reservation, unless Congress expressly divested the tribe of that authority.[50] This was also the prevailing administrative view of Indian law in 1954. *See, e.g., Powers of Indian Tribes*, 55 I.D. 14, 50 (1934) ("on all lands of the reservation, whether owned by the tribe, or members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business"). As stated in Felix Cohen's landmark treatise on Indian law, published

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[48] Section 2(e) of the 1950 Act provides that the ultimate arrangement between the Tribe and the United States would "final[ly] and complete[ly] settle[] . . . all claims" by the Tribe "arising because of construction of the Oahe project." (A191). Reading the Cheyenne River Act to divest the Tribe of licensing rights could well subject the United States to a claim for an uncompensated taking, thereby undermining the purpose of the 1950 Act and, once again, dictating the conclusion that the United States failed to fulfill the congressional mandate.

[49] Considering the negotiating position in which the Tribe found itself -- forced by Congress to sell and left only with the limited ability to justify as high a price as possible -- the Tribe had every incentive to identify lost hunting and fishing permit revenue as a basis for additional compensation. The fact that the Tribe never did so is strong evidence that the Tribe did not intend to forfeit those rights.

[50] This doctrine was of ancient lineage. *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) ("All these Acts . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive").

by the Department of the Interior in 1942, "[t]he statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. *What is not expressly limited remains within the domain of tribal sovereignty.*" F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942)(emphasis added).

The possibility that those "platonic notions of Indian sovereignty" may have since fallen into some disfavor, *County of Yakima v. Yakima Indian Nation*, 112 S.Ct. 683, 687-688 (1992), is irrelevant to the statutory analysis in this case. What is determinative is the fact that those notions formed *the backdrop against which Congress enacted the Cheyenne River Act*: Congress was constantly informed, by those it relied upon for expertise in the area of Indian law, that tribal regulatory authority would continue absent express divestiture, and while not necessarily conclusive on the issue, this "commonly shared presumption" of the various branches of the federal government "carries considerable weight." *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 206 (1978). Indian laws and treaties "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." *Id.* In this context, congressional silence creates the presumption that pre-existing and previously confirmed tribal licensing authority over non-Indians within the reservation would continue. *Green v. Bock Laundry Machinery Company*, 490 U.S. 504, 521 (1989).

Indeed, to the extent the legislative history even obliquely addresses the issue, it supports the conclusion that the Tribe retained licensing power. During the hearings on the Cheyenne River Act, the Tribe's attorney described the Tribe's hunting and fishing rights on the taken area in relation to Section X of the Act:

> Now, the right to hunt and fish is a tribal right. It is still preserved and is still holding. *No white citizen of South Dakota can go on this reservation and hunt unless he has first obtained a license from the Tribal Council.* Our right to continue hunting and fishing is to us an extremely valid and valuable right.

(JA 214)(emphasis added).[51] That statement must be read to demonstrate the Tribe's understanding that its licensing authority would continue alongside the Tribe's hunting and fishing rights after the Cheyenne River Act — an understanding that would control this Court's interpretation of the Cheyenne River Act, *see Washington State Commercial*, 443 U.S. at 676 (agreement must be understood in the sense it would naturally be understood by the Indians).

Moreover, the conclusion that the Tribe retained its licensing authority over the taken area is consistent with Section X's express — and unusual — reservation of all hunting and fishing rights held by the "*Tribal Council* and members of said Indian Tribe." (JA 244)(emphasis added). Since the Tribal Council consists entirely of members of the Tribe, the explicit reference to the Tribal Council would be meaningless surplusage unless this section is read to preserve something more than a mere individual right to hunt and fish. *Cf. United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015 (1992)("a statute must, if possible, be construed in such fashion that every word used has some operative effect."). The Tribe submits that Section X should therefore be read to *reserve* not only tribal members' right to fish and hunt on the taken area, but also the Tribal Council's right to license hunting and fishing on those lands (subject to regulations governing hunting and fishing by other citizens). *Cf. Menominee*, discussed *supra*, note 47.

At a minimum, this testimony put Congress on notice of the Tribe's valuable licensing right, triggering a duty to identify that right as among the taken rights and to compensate the Tribe accordingly. *See Central States v. Central States Transport, Inc.*, 472 U.S. 559, 572 (1985) (describing trustee's duty to the beneficiary when purchasing trust property to "determine exactly what property forms the subject-matter of the trust [and] who are the beneficiaries"); *Washington State Commercial*, 443 U.S. at 675-676 (1979) ("the United States, as the party with the presumptively

[51] The District Court said the word "Now" in the this testimony indicated that the Tribe's attorney was describing the state of affairs *prior* to the Cheyenne River Act. Thus, the District Court reasoned, the tribal attorney could not have been describing the effects of the Cheyenne River Act, even though his statements are entirely consistent with the effects of the Act. (JA 128-29). Now, this is a remarkable piece of legerdemain, for even a glance at the interchanges during the hearings reveals that both the Tribe's attorney and Representative Berry used the word "now" as a meaningless conversational preface to their statements. (JA 211, 213).

superior negotiating skills . . . has a responsibility to avoid taking advantage of the [Indian] side"). *See also* pages 27-28, *supra*.

Despite the contrary findings of both courts below, Petitioner claims to find "clear language of abrogation in the text" of the Cheyenne River Act. Pet.Br. 40. *See id.* at 37-39. Yet Petitioner points to no textual abrogation of tribal licensing power, and instead offers only an argument based on the structure of the Cheyenne River Act. Petitioner juxtaposes Section I of the Cheyenne River Act, which transfers certain proprietary interests in the land itself to the United States, with Section X, which reserves hunting and fishing rights to the Tribe. From this juxtaposition, Petitioner argues that the absence of any express reservation of further rights precludes the conclusion that the Tribe is left with anything other than the enumerated rights.

Petitioner reads far too much into Section I, which merely provides for the acquisition of proprietary interests in the land by the United States, and no more. Even the District Court agreed that the fact that Cheyenne River Act "convey[ed] limited title to lands necessary for the federal project does not positively denote a relinquishment of tribal jurisdiction over those lands." (JA 102).[52] This dichotomy between proprietary and jurisdictional interests comports with the ordinary presumption applied to federal land purchases — federal acquisition generally has no effect upon the jurisdictional status of the acquired land. 40 U.S.C. § 455.[53]

This Court rejected a similar argument based on the structure of another Indian-federal agreement in *United States v. Winans*, 198 U.S. 371 (1905). There, the State of Washington argued that a tribe's failure expressly to reserve certain rights, read alongside the tribe's express retention of others, constituted a forfeiture of the unreserved rights in question. This Court rejected that argument,

[52] Indeed, the District Court held that "the Cheyenne River Act should be construed so as to defend those rights *retained* by the Tribe." (JA 133)(original emphasis). The District Court's error lay in assuming that tribal civil regulatory power is something that must be *expressly delegated* by Congress, rather than something that, once confirmed by a previous treaty or statute, must be *expressly divested* by Congress. *See id.*

[53] The limited nature of the Tribe's proprietary relinquishment is also consistent with one Corps of Engineers officer's own conception of the Corps' interest in the taken area. *See* Pet.Br. at 45 ("'the Corps has *only proprietorial* jurisdiction over its project lands along the mainstem of the Missouri River'")(emphasis added).

stating that the relevant treaty, like the Cheyenne River Act, "was not a grant of rights to the Indians, but a grant from them — a reservation of those not granted." *Id.* at 381.[54] Under *Winans*, the presumption is not the forfeiture of all unreserved rights, but the retention of all unceded rights. *See also Winters v. United States*, 207 U.S. 564 (1908). *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975).[55]

Petitioner attempts to buttress its structural argument about the Cheyenne River Act by reference to the legislative history of the Act of 1950, which set the framework for the negotiations leading up to the acquisition of the taken area. Petitioner points to the deletion from an early, unenacted version of Section 7 of the 1950 Act of language requiring the "preservation of any treaty rights of the tribe in regard to fishing, hunting, and trapping." Pet.Br. at 40-41. Once again, Petitioner pursues an argument that even the District Court rejected. (JA 137)("The best that can be said of the Act [of 1950] is that it sought to preserve treaty hunting and fishing rights").

A similar argument was rejected by this Court in *Menominee*, where the tribe objected to the deletion from the Menominee Termination Act of language expressly preserving the tribe's hunting and fishing rights, out of fear that the bill's "silence [on this point] would by implication abolish those hunting and fishing rights." 391 U.S. at 408. This Court refused to treat the earlier deletion of language as a "backhanded way of abrogating" tribal rights. *Id.* at 412. Petitioner's similar attempt to impute to Congress an intent to

[54] The treaty at issue in *Winans* contained language, substantively identical to language in Section I of the Cheyenne River Act, that ceded "all their right, titles, and interest" in the ceded land to the United States. 198 U.S. at 377. Notwithstanding that language, the Court found that the treaty reserved to the tribe the unenumerated rights to occupy and cross over the ceded land for hunting and fishing purposes.

[55] In *Winters*, this Court found that a tribal-federal agreement by which two tribes ceded large portions of their reservation preserved the tribes' water rights, even though the cession agreement contained no express reservation of those rights. As noted above, page 29, this Court framed the issue as one of contract interpretation and relied on the dual principles that such agreements must be construed in favor of the Indians and that the United States' and the tribes' joint insistence as to the meaning of the contract should control. Either of those principles is sufficient to mandate the conclusion here that the Tribe retained its licensing authority.

abrogate — on the basis of something Congress *did not say* — deserves the same fate.[56]

Petitioner finally appeals for support to the supposed "administrative interpretation" of the Cheyenne River Act by the Army Corps of Engineers. Pet.Br. 45-47. This avenue is closed, as Petitioner well knows: Petitioner sought a finding of fact from the District Court to the effect that the Corps' "consistent administrative interpretation" favored petitioner, Plaintiff's Proposed Findings of Fact Nos. 208-13, *but the District Court rejected that finding*. Petitioner did not appeal that ruling, and it is not before this Court.[57]

Absent an abrogation clear from the Act's language, legislative history, or purpose, Petitioner's contention reduces to an argument that the Cheyenne River Act repealed the Tribe's authority by silent implication. As this Court recently admonished, "'repeals by implication are not favored'" in the field of Indian law. *County of Yakima*, 112 S.Ct. at 690. Petitioner's argument that the Cheyenne River Act's overall effect supposedly repealed tribal treaty rights confirmed by the IRA resembles the Yakima Nation's argument. The Yakima Nation argued that the IRA policy favoring tribal

[56] In any event, Petitioner ignores the fact that the sole purpose of the 1950 Act was to authorize and develop the framework for federal-tribal negotiations. *United States v. 2,005.32 Acres of Land*, 160 F. Supp. 193, 200 (D.S.D. 1958). In that context, assuming *arguendo* that an omission can have any meaning at all, this omission can at most be read as a congressional decision not to address the issue of treaty hunting and fishing rights specifically at that preliminary stage of the acquisition process. In any event, the negotiations themselves never addressed the Tribe's pre-existing and previously confirmed licensing authority, which dictates the conclusion that said authority was unaffected.

[57] It is worth noting that Petitioner cites only informal statements by Corps personnel, the majority of which merely appear to reflect the Corps' overall jurisdiction-neutral attitude towards the land it owns along the Missouri River. The most forceful — and the only relevant — statement of Corps policy with regard to jurisdiction is its formal regulations, which allow for local jurisdiction over hunting and fishing on these areas and provide that tribal treaty rights supersede the Corps' own regulations concerning use of its land. *See* note 40, *supra*. The Corps' interpretation of the Cheyenne River Act at its inception likewise supports the Tribe. In its comments on the Act, attached to the Senate Report on the final version prior to passage, the Corps noted that "[r]elative to wildlife, it should be noted that H.R. 2333 contemplates reservation of fishing and hunting rights by the Indians." S.Rep. No. 2489 at 10. The Corps opposed that reservation of rights and therefore opposed the bill's final form. *Id.* at 12.

sovereignty implicitly repudiated the effects of the General Allotment Act, which was intended to dissolve tribal government. This Court rejected the Yakima Nation's argument for a repeal by implication:

> Judges "are not at liberty to pick and choose among congressional enactments, and when two [or more] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."

112 S.Ct. at 692 (alteration in original). Here, the Cheyenne River Act can be read consistently with the 1868 Fort Laramie Treaty, with the IRA, and with the pre-existing federal recognition of the Tribe's authority to license non-Indian hunting and fishing on this portion of its territory. *See* Joint Senate-House Hearings at 216 (discussing the relation between the IRA and the Treaty of 1868, the tribal counsel told the Committee, "We have no repeals by implication."); *id.* at 238-41 (Sen. Case, the sponsor, discussing continuing vitality of IRA and Treaty of 1868). As in *County of Yakima*, this Court should not do by implication what Congress did not do expressly.[58]

Finally, the Court should keep in mind that the United States, the only other party to the Cheyenne River transaction, agrees that the Cheyenne River Act did not divest the Tribe of licensing power. This is not an instance like that in *Montana*, where the United States and the Tribe on the one hand, and a state on the other, disagreed over questions of law, such as the application of various doctrines

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[58] When Congress meant to displace or override prior law — including tribal law — in order to effectuate the design of the Cheyenne River Act, it did so expressly. For example, when Congress wished to allow the Tribal Council to distribute tribal lands to Indians displaced by the flood project, it knew that express legislation was necessary to override existing federal and tribal prohibitions on alienation of tribal lands. *See* Fort Laramie Treaty of 1868, Art. 12; 25 U.S.C. § 462; Chey.R.Sx. Const. Art. VIII, § 2. Congress knew that if it wished to abrogate "the Tribal Constitution or Ordinance or Resolution thereunder," it had to do so expressly, and it did so here with respect to compensatory distribution of tribal lands. Pub.L. No. 776, § XI (JA 246). Since Congress obviously examined the Tribe's laws and ordinances carefully, and specifically overrode those that stood in the way of its legislative goals, it is inconceivable that Congress somehow overlooked the tribal licensing provisions which the Secretary of the Interior had approved. Yet, according to Petitioner, those provisions have been silently abrogated in this case.

to the statutes at hand, or the nature and scope of tribal sovereignty. This case involves a different sort of dispute. The District Court formally found — and is it undisputed — that the Tribe exercised licensing power over the taken area both before and after the Cheyenne River Act. That power was confirmed in the Tribe by the IRA in 1934. The question here is whether the Cheyenne River Act, which embodied an agreement between the Tribe and the United States, divested that power. As the only parties to that agreement, the United States and the Tribe have special knowledge pertaining to it, and their joint interpretation of its terms must be deemed conclusive, Petitioner's self-serving, third-party opinion notwithstanding. *See* pages 28-29, *supra*.

II. THIS FEDERALLY RECOGNIZED TRIBAL POWER TO REGULATE HUNTING AND FISHING ON FEDERAL LAND WITHIN THE RESERVATION IS CONSISTENT WITH THE HOLDINGS IN *MONTANA* AND *BRENDALE*.

A. THE HOLDINGS IN *MONTANA* AND *BRENDALE* TURNED ON THE ALIENATION OF TRIBAL LAND UNDER THE ALLOTMENT ACT POLICY OF EXTINGUISHING TRIBAL GOVERNMENT.

Petitioner interprets *Montana* as supplanting all prior precedent relevant to tribal civil authority over non-Indians, and as conflating tribal power flowing from land ownership with tribal power confirmed by treaty, to produce a new rule that "a treaty right to regulate non-Indians can exist, if it exists at all, only on lands over which the tribe has 'absolute and undisturbed use and occupation.'" Pet.Br. 11 (quoting *Montana*, 450 U.S. at 559). Petitioner's error lies in extracting this dictum from the particular factual context of *Montana* and the Allotment Act, and generalizing it to create a new field theory for tribal civil regulatory authority over non-Indians on the reservation.

Indeed, Petitioner's effort to extend the holding in *Montana* to govern the very different circumstances of this case is at odds with this Court's explicit admonition in *Montana* itself:

> Though the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing

> by non-Indians on the reservation, the regulatory issue before us is a *narrow* one[:] . . . *the power of the Tribe to regulate non-Indian hunting and fishing on reservation land owned in fee by non-members of the Tribe*.

Montana, 450 U.S. at 557 (emphasis added). *Brendale* involved the similarly narrow issue of tribal power "to zone fee lands owned by non-members." 492 U.S. at 414. There is no escaping the fact that the land over which a tribe unsuccessfully asserted regulatory power in each case was *private land held in fee simple* by individuals who were not members of the tribe. That fact was repeatedly stressed by this Court in both cases. *See, e.g., Montana*, 450 U.S. at 557, 559 n.9, 561, 563, 564, 565 n.14; *Brendale*, 492 U.S. at 414, 416, 419, 422, 423, 425, 427, 428.

No such land is at issue here. The property on which the Tribe claims power to license hunting and fishing is not private property owned in fee simple by non-Indian individuals, but public property owned by the United States, which was taken by the federal government for the limited purpose of building a dam, with reservation of other rights to the Tribe. Here, as in *Montana* and *Brendale*, "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Montana*, 450 U.S. at 561. *See also Brendale*, 492 U.S. at 422. But in this case both the *mode* of alienation and the underlying statutory *purpose* for that alienation were entirely different from what this Court confronted in those cases.

The land at issue in *Montana* and *Brendale* had been alienated in fee simple to individual non-Indians pursuant to the Allotment Act — a factor this Court deemed decisive. *Brendale*, 492 U.S. at 422-23.[59] As the Court recently summarized, "[t]he objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty,

[59] *Montana* also involved regulatory power over a riverbed reserved to the state under the "equal footing" doctrine. 450 U.S. at 550-51. The nature of tribal alienation of the riverbed therefore was not an issue because the riverbed had never been part of the reservation; under the doctrine it had always been reserved for Montana. Furthermore, state ownership of riverbed lands is bound up with state sovereignty concerns, *id.* at 551-52, whereas riverbed lands that were reserved for Indians — such as those here — do not implicate state sovereignty, particularly where the state has disavowed all interest in them. S.D. Const., Art. XXVI, § 18 ("Indian lands shall remain under the absolute jurisdiction and control of the Congress").

erase reservation boundaries, and force the assimilation of Indians into the society at large." *County of Yakima*, 112 S.Ct. at 686. The legislative history and avowed purpose of the Allotment Act made plain that Congress could not have intended that "non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the *dissolution of tribal affairs and jurisdiction*." *Montana*, 450 U.S. at 560 n.9 (emphasis added). *Brendale* likewise involved settlers and the use of allotted fee land by individuals to build cabins and other single-family residential dwellings. *See* 492 U.S. at 417-18. As the plurality explained in *Brendale*:

> In *Montana*, as in the present cases, the lands at issue had been alienated under the Allotment Act, and the Court concluded that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." 450 U.S. at 560 n.9.

492 U.S. at 423 (White, J.).

Thus, although there is nothing in the text of the Allotment Act that "explicitly qualifies the Tribe's rights over hunting and fishing," *Montana*, 450 U.S. at 559 n.9, the unambiguous policy of that statute overcame the presumption that tribal authority and rights are unaffected by statutory silence. *Cf. Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 773 n.23 (1985) (failure of a statute or treaty expressly to mention cession of tribal rights mandates presumption that such rights continue). The manifest purpose and effect of the Allotment Act "would appear to render [the Tribe's] continued exercise [of the rights at issue] inconsistent" with alienation of land to private non-Indian owners in fee simple. *Id.* at 773. This was no "backhanded" abrogation of tribal authority, because the "statute's 'legislative history' and 'surrounding circumstances,'" *United States v. Dion*, 476 U.S. at 739, manifested the change in status of tribal power. Pre-existing tribal regulatory power simply could not "co-exist" with the Allotment Act's alienation of tribal land in fee simple to non-Indians. *Cf. County of Yakima*, 112 S.Ct. at 692; *Astoria Federal Savings & Loan Ass'n v. Solimino*, 111 S.Ct. 2166, 2170 (1991).

The "subsequent alienation" of land at issue in this case is entirely different. This was not a breaking-up and selling-off of reservation lands to individual non-Indians under the Allotment Act, but the purchase by the United States of certain property interests for the construction of the Oahe Reservoir pursuant to the Cheyenne River Act. As explained above, pages 35-36, the purposes of that act were to acquire Tribal land to the extent necessary for the reservoir and to rehabilitate the Cheyenne River Sioux Tribe so as to minimize the effect on it of the flood control project.[60] The United States took only what it needed for its reservoir; many tribal rights were expressly reserved. There was no diminution of the Reservation's boundaries, let alone any attempt to break it up and sell it off to non-Indians.

The tribal regulatory power struck down in *Montana* fell on hunting and fishing by non-Indians on their own individual, private property — land alienated in fee pursuant a law enacted to extinguish tribal regulatory power. But this case involves no settlers or homesteaders. The regulation of non-Indian hunting and fishing here falls on transient sportsmen, temporary invitees on federal property within the Cheyenne River Sioux Reservation. *Cf. Montana*, 450 U.S. at 562 (distinguishing between fee land owned by non-Indians and property "held or controlled by Indians or the United States"). In contrast to *Montana* and *Brendale*, in this case there is nothing about tribal power to license hunting and fishing (including the possibility of federal enforcement under the Lacey Act) that is irreconcilable with ownership of the taken area by the

[60] Petitioner's attempt to conjure a congressional design to destroy tribal government by linking the Cheyenne River Act to termination legislation is risible. Pet.Br. 31-33. This contention cannot be squared with the Act's history, with its purpose of rehabilitating the Tribe, Section I, or with its enhancement of the Tribal Council's authority by delegation to that body of various powers, including control of the large fund appropriated to restore the Tribe's economic, social, and community life. Section V (JA 239). Petitioner's citations to the legislative history merely demonstrate a congressional desire that the Act diminish the Tribe's *dependence* upon the federal government, *not* a congressional plan to diminish tribal *self-government*. Finally, Petitioner is mistaken in assuming that enactment of a bill during the so-called "termination era" stamps that law with a congressional purpose to strip tribes of power to license hunting and fishing within their reservations. In 1954, Congress enacted Public Law 280, 18 U.S.C. § 1162(c), which preserves pre-existing tribal rights relating to "the control, licensing, or regulation" of hunting and fishing. *See Menominee*, 391 U.S. at 410-11.

United States. The power to regulate hunting and fishing by non-Indians that was recognized by the Indian Reorganization Act can easily co-exist with the flood control and tribal rehabilitative policies of the Cheyenne River Act.

B. Even if *Montana* Were Extended To Govern This Case, Tribal Regulation Should Be Sustained Under the Second Exception Enumerated in *Montana*.

Assuming *arguendo* that *Montana* governs tribal licensing power over the taken area, this case should be remanded to the Eighth Circuit for the initial determination of whether the non-Indian conduct the Tribe would regulate threatens the "political integrity, economic security, or health or welfare of the tribe." *Montana*, 450 U.S. at 566. As Petitioner points out, Pet.Br. 8 n.3, the Court of Appeals had no occasion to decide whether the District Court misapplied this legal standard, or whether its findings were clearly erroneous, although both the Tribe and the United States raised these points below. Tribe's Opening Br. at 10; Tribe's Reply Br. at 23-26; Brief *Amicus Curiae* of the United States at 16-18. Instead, the Eighth Circuit remanded to the District Court for new findings to re-assess the *Montana* factors with respect to the relationship in the taken area between the 104,000 acres of former tribal trust land and the 18,000 acres of once-alienated land. (A46 & n.20).

This additional layer of complexity, and the uncertain status of the District Court's findings on this issue, counsel special attention to the rule against this Court addressing in the first instance an issue that, the parties agree, was not reached by the court below. *Carden v. Arkoma Associates*, 494 U.S. 185, 197 (1990); *IBEW v. Hechler*, 481 U.S. 851, 865 (1987).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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